VOLUME XLIII NUMBER 3

Massachusetts Law Quarterly

OCTOBER, 1958

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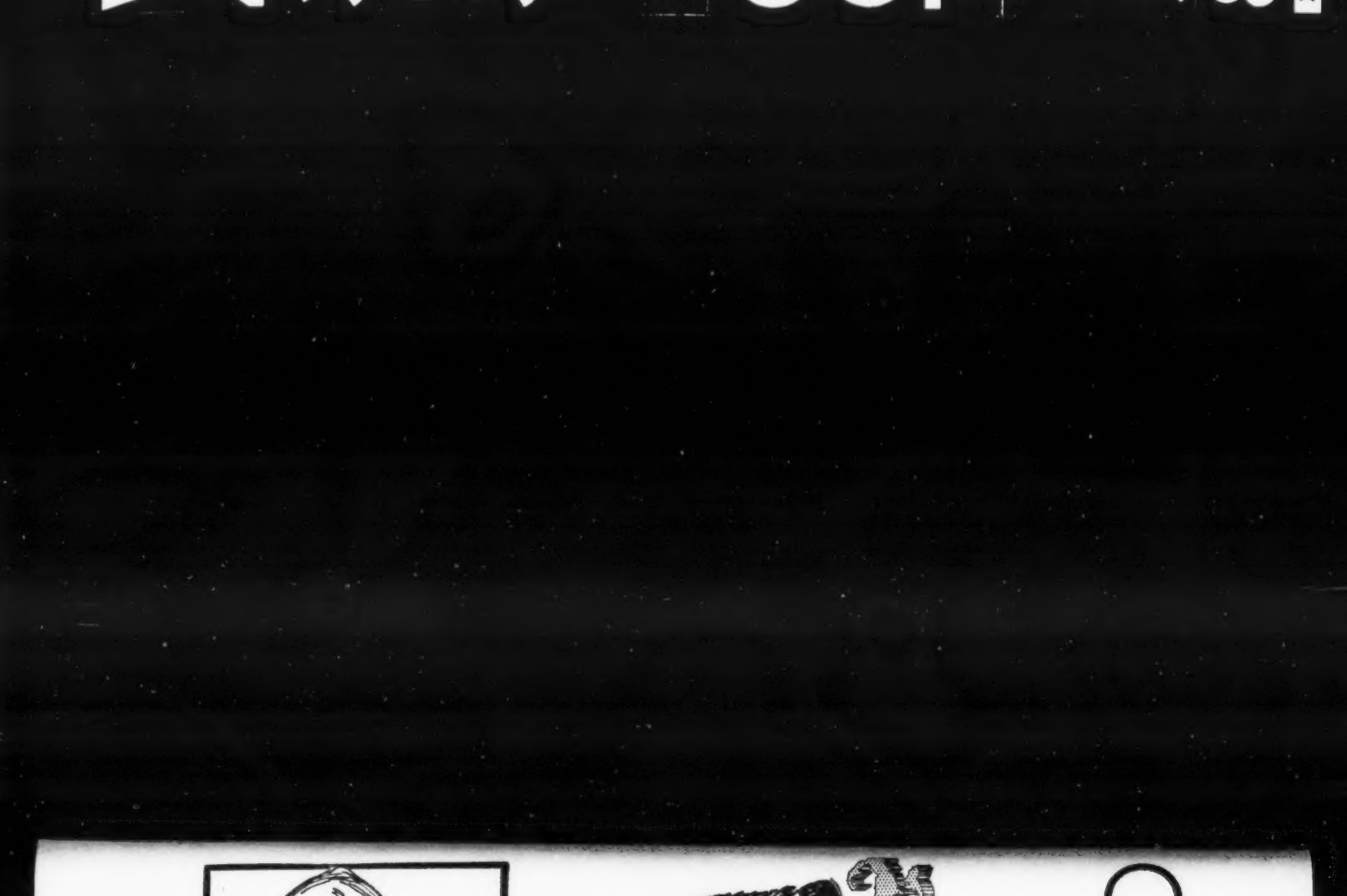
Midwinter Meeting in Holyoke, February 13-14, 1959

Save the Date

Issued by the Massachusetts Bar Association

15 Pemberton Square **Boston 8, Massachusetts**



Massachusetts Law Quarterly

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Midwinter Meeting in Holyoke, February 13-14, 1959

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CHAP. 121. RESOLVE PROVIDING FOR AN INVESTIGATION BY THE JUDICIAL COUNCIL RELATIVE TO THE OPERATION OF MOTOR VEHICLES, ESPECIALLY WITH REFERENCE TO THE PENALTIES FOR MANSLAUGHTER AND OTHER OFFENCES CAUSING DEATH OR INJURY.

Resolved, That the judicial council be requested to investigate the subject matter of current senate document numbered 724, relating to the operation of motor vehicles, especially with reference to the penalties for manslaughter and other offences causing death or injury, and to include its conclusions and its recommendations, if any, in relation thereto, together with drafts of such legislation as may be necessary to give effect to the same, in its annual report for the year nineteen hundred and fifty-eight. *Approved July 21, 1958.*

REQUEST FOR SUGGESTIONS

Suggestions are requested. Any suggestions should be sent to F. W. Grinnell, Secretary, Judicial Council of Massachusetts, 60 State St., Boston, Mass.

EXECUTIVE COMMITTEE 1958-59

At the recent meeting of the Board of Delegates seven members of the Executive Committee and an Assistant Secretary were elected in accordance with the by-laws to serve with the *ex officio* members as follows: Assistant Secretary, Alan J. Dimond.

Executive Committee

The President, the Vice-Presidents, the Treasurer, the Secretary, the Assistant Secretary *ex officio*.

President: Raymond F. Barrett, Quincy.

Treasurer: Gerald P. Walsh, New Bedford.

Secretary: Frank W. Grinnell, Boston.

Asst. Secretary: Alan J. Dimond, Brookline.

Vice Presidents:
Lincoln S. Cain, Pittsfield.
James H. Fitzgerald, Brockton.
Harold Horvitz, Cambridge.
Bertha R. Kiernan, Chelsea.
Stanley B. Milton, Worcester

From the Board of Delegates

Michael Carchia of Belmont, Milton J. Donovan of Springfield, Hon. Gertrude R. Halloran of Quincy, Henry R. Mayo, Jr. of Lynn, George A. McLaughlin of Cambridge.

From the Membership at Large

Roger J. Donahue of Boston, Livingston Hall of Concord.

NEW STATUTES NOW IN EFFECT

(1) NEW G.L. C. 233, sec. 79G is added by Acts of 1958, c. 323, making bills subscribed and sworn to under penalties of perjury, of physicians, dentists and hospitals, admissible in evidence in personal injury actions. Adversary must be given 10 days' notice before trial. (See Mass. Law Quarterly, July 1958 issue, pp. 20-21, for discussion.)

(2) Acts of 1958, c. 369, effective Sept. 1, 1958, repeals the Fielding Act and authorizes transfer for trial from Superior Court to District Court of ANY action in which Superior Court determines "there is no reasonable likelihood that recovery will exceed $1,000." District Courts no longer have exclusive jurisdiction of motor tort actions; actions started in District Court can no longer be removed by plaintiff. After District Court trial, either party can request re-transfer to Superior Court for jury trial. See also new rule 33A on pp. 111-112 of this issue.

UNIFORM COMMERCIAL CODE — EFFECTIVE OCTOBER 1, 1958 — INFORMATION FOR PRACTITIONERS

We have received the following information for practical use under the new code.—Ed.

ANNOUNCEMENT OF BANKERS MANUAL ON THE UNIFORM COMMERCIAL CODE

The Massachusetts Bankers Association announces the publication of a "Bankers Manual on the Uniform Commercial Code", prepared by a committee of counsel for the Boston Clearing House Association, the Massachusetts Bankers Association, the Savings Banks Association of Massachusetts and the Massachusetts Cooperative Bank League, in collaboration with Carl W. Funk, Esquire, author of a similar volume relating to the earlier version of the Code as enacted in Pennsylvania.

Its 250 odd pages are designed to inform banks and bankers about those provisions of the Code relating to banking and finance. The book highlights in considerable detail the Articles of the Code dealing with commercial paper, bank deposits and collections, letters of credit, investment securities and secured transactions. The text relating to secured transactions plus ten sample forms of security agreement for use under the Code occupy almost half the book.

The Manual is written for lawyers as well as non-lawyers. General discussion of each problem is accompanied by references to particular provisions of the Code or the Annotations to the Code and thus serves as a starting point for more detailed analysis.

Although written from a Massachusetts point of view, the Manual is designed for use in any state. It contains a pocket supplement designed to cover special Massachusetts problems. The Massachusetts supplement is concerned primarily with steps that should be taken in preparation for October 1, 1958, the effective date of the Code.

Preparation of the Manual was coordinated by Walter D. Malcolm. Individual lawyers primarily responsible for various chapters and the Appendix are: William J. Speers, Jr., Austin S. Ashley, Arthur P. Schmidt, Alfred Gardner, Robert Moncreiff, Peter F. Coogan, Oscar W. Haussermann, Jr., James Vorenberg, Robert Haydock, Jr., Robert C. Hooper, and Charles C. Craig.

The Manual may be purchased from the Massachusetts Bankers Association, 80 Federal Street, Boston 10, at $5.00 per copy.

UNIFORM COMMERCIAL CODE STANDARD FORMS

In view of the new filing requirements of Article 9 of the Uniform Commercial Code, attorneys will have to have available a new form of financing statement for filing under the Code. Later they will need new forms of continuation statement, termination statement, statement of assignment and statement of release.

Mr. Francis Ahearn, First Deputy Secretary of State, anticipating the problem in his office of handling the filings under the Code, called in Garrison K. Hall, a Methods and Systems consultant to design a system for mechanizing the paperwork which would be involved.

Mr. Hall (the proprietor of Micro-Photography Company) made a careful study of the operation of the Code in Pennsylvania, where the Code has been in effect since 1953. The Code has also been adopted in Kentucky but is not yet in effect. As a result, he has designed a system which materially improves the handling of paperwork under the Code.

The new system is based on the use of sets of standard self-indexing forms for Financing Statements. The forms have been officially approved by Mr. Ahearn. They are also approved by the Commissioners on Uniform Laws. They have been cleared and approved by bank and lawyer representatives of the Bankers Code Committee, who strongly recommend that these forms be uniformly used in every case that a financing statement is filed, whether in the Secretary of State's office, City or Town Clerk's offices or Registries of Deeds.

The first of these is a five-part form with interleaved carbon paper (known as Form *UCC-1*) prepared by Secured parties in one typing operation. The first three copies are mailed to the filing office, where all three copies are stamped with the date and hour of filing and the file number.

The *first* copy is then filed alphabetically. This constitutes an exceptionally good, single-reference, indexing system because it contains the description of the collateral and makes unnecessary any reference to the numerical file. Also, all financing statements relating to each debtor are brought together in the file. Clerical work and delays in preparation of index cards are reduced.

The *second* copy is filed numerically (in order of receipt). This file constitutes a good cash receipts journal and also an entry book. Should a document be lost from the alphabetical file a photostat of the numerical file can be made to reconstruct the record.

The *third* copy is returned to the secured party. The name and address of the secured party has been correctly positioned for mailing in a window envelope to save a clerical operation that might otherwise delay receipt of the acknowledgment. This copy, showing the date, hour and file number later becomes the secured party's termination statement, requiring only to be dated and signed. As a termination statement, it is by design of the system, incapable of containing errors as to the name of debtor, date, file number or collateral. It is hoped that secured parties will file these termination statements in such a way that they can be used on all transactions as soon as the security interest ceases. This will reduce the bulk of the files, inconvenience to debtors when the presence of the financing statement reflects unfairly on his credit and loss of good will for secured parties when collateral is to be pledged again.

The *fourth* copy is for the secured party. It is suggested that this

UNIFORM COMMERCIAL CODE — FINANCING STATEMENT — FORM UCC-1

INSTRUCTIONS

1. PLEASE TYPE this form. Fold only along perforation for mailing.
2. Remove Secured Party and Debtor copies and send other 3 copies with interleaved carbon paper to the filing officer. Enclose filing fee of $3.00.
3. When filing is to be with more than one office, Form UCC-2 may be placed over this set to avoid double typing.
4. If the space provided for any item(s) on the form is inadequate the item(s) should be continued on additional sheets, preferably 5" x 8" or 8" by 10". Only one copy of such additional sheets need be presented to the filing officer with a set of three copies of the financing statement. Long schedules of collateral, indentures, etc. may be on any size paper that is convenient for the secured party.
5. If collateral is crops or goods which are or are to become fixtures, describe generally the real estate and give name of record owner.
6. When a copy of the security agreement is used as a financing statement, it is requested that it be accompanied by a completed but unsigned set of these forms, without extra fee.
7. At the time of original filing, filing officer should return third copy as an acknowledgement. At a later time, secured party may date and sign Termination Legend and use third copy as a Termination Statement.

This FINANCING STATEMENT is presented to a filing officer for filing pursuant to the Uniform Commercial Code. | 3 Maturity date (if any):

1 Debtor(s) (Last Name First) and address(es)	2 Secured Party(ies) and address(es)	For Filing Officer (Date, Time, Number, and Filing Office)
Mesina George H. & Mesina Emma 1607 Potomoc Avenue Boston, Massachusetts	Boston Savings & Trust Company 426 McNeilly Road Boston 15, Massachusetts	10/1/58 0900 1234 CITY CLERK OF BOSTON

4 This financing statement covers the following types (or items) of property :

1. Model 99 Trans-Muck
2 Model 87 Heat Exchangers
1 Model 108 Mileage Booster Serial #58105321
1 Model 85 Eater Chiller Serial #5711368

Check ☒ if covered: ☒ Proceeds of Collateral are also covered ☐ Products of Collateral are also covered No. of additional sheets presented:

Filed with:

George Mesina
By: Emma Mesina
Signature(s) of Debtor(s)

Boston Savings & Trust Company
By:
Signature(s) of Secured Party(ies)

Filing Officer Copy — Alphabetical

This form of financing statement is approved by the Secretary of State.

STANDARD FORM — UNIFORM COMMERCIAL CODE — FORM UCC-1 *Forms may be purchased from Hobbs & Warren, Inc., 34 Hawley St., Boston, Mass.*

UNIFORM COMMERCIAL CODE

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UNIFORM COMMERCIAL CODE
STATEMENTS OF CONTINUATION, PARTIAL RELEASE, ASSIGNMENT, ETC. — FORM UCC-3

INSTRUCTIONS

1. PLEASE TYPE this form. Fold only along perforation for mailing.
2. Remove Secured Party and Debtor copies and send other 3 copies with interleaved carbon paper to the filing officer.
3. Enclose filing fee.
4. If the space provided for any item(s) on the form is inadequate the item(s) should be continued on additional sheets, preferably 5" x 8" or 8" x 10". Only one copy of such additional sheets need be presented to the filing officer with a set of three copies of Form UCC-3. Long schedules of collateral, etc. may be on any size paper that is convenient for the secured party.
5. At the time of filing, filing officer will return third copy as an acknowledgement.

This STATEMENT is presented to a filing officer for filing pursuant to the Uniform Commercial Code.

3 Maturity date (if any):

1 Debtor(s) (Last Name First) and address(es)	2 Secured Party(ies) and address(es)	For Filing Officer (Date, Time, Number, and Filing Office)
Mesina George H. & Mesina Emma 1607 Potomac Avenue Boston, Massachusetts	Boston Savings & Trust Company 426 McNeilly Road Boston 15, Massachusetts	10/16/58 10:30 1723

This statement refers to original Financing Statement No. 1234 Dated October 1, 1958

A. Continuation ☐	B. Partial Release ☒	C. Assignment ☐	D. Other: ☐
The original financing statement between the foregoing Debtor and Secured Party, bearing the file number shown above, is still effective.	From the collateral described in the financing statement bearing the file number shown above, the Secured Party releases the following:	The Secured Party certifies that the Secured Party has assigned to the Assignee whose name and address is shown below, Secured Party's rights under the financing statement bearing the file number shown above in the following property:	

1 Model 99 Trans-Muck
1 Model 87 Heat Exchangers

Boston Savings & Trust Company

Dated: October 15, 1958

By: _____
(Signature of Secured Party)

Filing Officer Copy — Alphabetical.

STANDARD FORM — UNIFORM COMMERCIAL CODE — FORM UCC-3 *Forms may be purchased from Hobbs & Warren, Inc., 34 Hawley St., Boston, Mass.*

be kept in a pending file until acknowledgment is received from the filing office. It can then be removed and the acknowledgment filed by maturity date (or a date entered, five years from the filing, if there is no maturity date). This will serve as a follow-up to warn secured parties when it is necessary to file a continuation statement.

The *fifth* copy is for the debtor.

When filing is to be made in more than one office a second standard form, Form UCC-2 (Identical to UCC-1 but in three parts only), may be placed over UCC-1 so that only one typing is needed to prepare enough copies for both filings.

Another standard form, *UCC-3* is available for *continuation statements, partial releases, assignments, amendments, termination statements* (when acknowledgment copy of UCC-1 is not available) etc. It is a five-part form with interleaved carbon and with the same distribution of copies as UCC-1. Use of this form is less likely to result in error than typed statements with varying phraseology.

Form *UCC-11* is for requesting information or photostat copies. It is sent to the filing officer in duplicate. The original is returned with the copies or filled in as a certificate listing the financing statements on file. The duplicate remains in the filing office.

It is hoped that most City and Town Clerks will follow the same procedures as the office of the Secretary of State.

It is suggested that all law offices in which filings under the Code may be made, will keep on hand a supply of UCC-1, UCC-2, UCC-3 and UCC-11.

In any case where the original security agreement is filed in any filing office as a financing statement, it is recommended that in addition to the signed security agreement the secured party prepare and file a set of Forms UCC-1 with the filing office even though unsigned.

These forms and an Operating Manual may be purchased from Hobbs and Warren, 34 Hawley Street, Boston, Massachusetts.

A new service is being planned to provide secured parties with a search and filing service. Under this plan, secured parties or others wishing to make filings will be able to send filing papers to this agency, who will then conduct a search to make sure that the collateral, is clear. If this is so, the filing will be made by the agency in the appropriate offices. In planning this service, consideration is being given to the taking out of errors and omissions liability insurance. The fee for this service will be $5.00 for each filing. At present the service is being planned only for filings in the offices of the Secretary of State and City Clerk of Boston. Any law office or attorney who is interested in this service or would like more information should get in touch with Garrison K. Hall, 97 Oliver Street, Boston, Massachusetts. Telephone HAncock 6-3221.

CODE AMENDMENTS OF AUGUST 20, 1958

CHAP. 542. AN ACT MAKING CERTAIN CORRECTIVE AND OTHER CHANGES IN THE UNIFORM COMMERCIAL CODE.

Whereas, The deferred operation of this act would tend to defeat its purpose, which is, in part, to make certain corrective and other changes in chapter one hundred and six of the General Laws, as appearing in section one of chapter seven hundred and sixty-five of the acts of nineteen hundred and fifty-seven, which takes effect on October first, nineteen hundred and fifty-eight, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.

Be it enacted, etc., as follows:

SECTION 1. Section 1—201 of chapter 106 of the General Laws, as appearing in section 1 of chapter 765 of the acts of 1957, is hereby amended by striking out subsection (30) and inserting in place thereof the following subsection:—

(30) "Person" includes an individual or an organization.

SECTION 2. Said section 1—201 of said chapter 106, as so appearing, is hereby further amended by striking out subsection (33) and inserting in place thereof the following subsection:—

(33) "Purchaser" means a person or his nominee who takes by purchase.

SECTION 3. Section 2—312 of said chapter 106, as so appearing, is hereby amended by adding at the end the following subsection:—

(4) Unless otherwise agreed a seller makes no warranty under subsection (3) with respect to any claim for which the exclusive remedy of the claimant is by action against the United States in the Court of Claims or in the district courts of the United States.

SECTION 4. Subsection (1) of section 2—603 of said chapter 106, as so appearing, is hereby amended by striking out, in line 10, the word "idemnity" and inserting in place thereof the word:—indemnity,— so as to read as follows:—

(1) Subject to any security interest in the buyer (subsection (3) of section 2—711), when the seller has no agent or place of business at the market of rejection a merchant buyer is under a duty after rejection of goods in his possession or control to follow any reasonable instructions received from the seller with respect to the goods and in the absence of such instructions to make reasonable efforts to sell them for the seller's account if they are perishable or threaten to decline in value speedily. Instructions are not reasonable if on demand indemnity for expenses is not forthcoming.

SECTION 5. Said chapter 106 is hereby further amended by striking out section 3—104, as so appearing, and inserting in place thereof the following section:—

Section 3—104. Form of Negotiable Instruments; "Draft"; "Check"; "Certificate of Deposit"; "Note".

(1) Any writing to be a negotiable instrument within this Article must

(*a*) be signed by the maker or drawer; and

(*b*) contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power given by the maker or drawer except as authorized by this Article; and

(*c*) be payable on demand or at a definite time; and

(*d*) be payable to order or to bearer.

(2) A writing which complies with the requirements of this section is

(*a*) a "draft" ("bill of exchange") if it is an order;

(*b*) a "check" if it is a draft drawn on a bank and payable on demand;

(*c*) a "certificate of deposit" if it is an acknowledgment by a bank of receipt of money with an engagement to repay it;

(*d*) a "note" if it is a promise other than a certificate of deposit.

(3) As used in other Articles of this chapter, and as the context may require, the terms "draft", "check", "certificate of deposit" and "note" may refer to instruments which are not negotiable within this Article as well as to instruments which are so negotiable.

SECTION 6. Section 3—511 of said chapter 106, as so appearing, is hereby amended by striking out subsection (6) and inserting in place thereof the following subsection:—(6) Where a waiver of presentment, notice or protest is embodied in the instrument itself it is binding upon all parties; but where it is written above the signature of an indorser it binds him only.

SECTION 7. Subparagraph (*d*) of subsection (1) of section 3—601 of said chapter 106, as so appearing, is hereby amended by striking out, in line 1, the word "security" and inserting in place thereof the word:—collateral,—so as to read as follows:—

(*d*) impairment of right of recourse or of collateral (section 3—606); or.

SECTION 8. Subparagraph (*b*) of subsection (3) of said section 3—601 of said chapter 106, as so appearing, is hereby amended by striking out, in line 3, the word "security" and inserting in place thereof the word:—collateral,—so as to read as follows:—

(*b*) is discharged under any provision of this Article, except as otherwise provided with respect to discharge for impairment of recourse or of collateral (section 3—606).

SECTION 9. Section 8—311 of said chapter 106, as so appearing, is hereby amended by striking out, in lines 2 and 3, the word "effectiveness" and inserting in place thereof the word:—ineffectiveness,—so as to read as follows:—

Section 8—311. Effect of Unauthorized Indorsement.

Unless the owner has ratified an unauthorized indorsement or is otherwise precluded from asserting its ineffectiveness.

(*a*) he may assert its ineffectiveness against the issuer or any purchaser other than a purchaser for value and without notice of adverse claims who has in good faith received a new, reissued or reregistered security on registration of transfer; and

(*b*) an issuer who registers the transfer of a security upon the unauthorized indorsement is subject to liability for improper registration (section 8—404).

SECTION 10. Subsection (2) of section 9—105 of said chapter 106, as so appearing, is hereby amended by striking out, in line 1, the word "apply" and inserting in place thereof the word:—applying,—so as to read as follows:—

(2) Other definitions applying to this Article and the sections in which they appear are:

"Account".	Section 9 — 106.
"Consumer goods".	Section 9 — 109 (1).
"Contract right".	Section 9 — 106.
"Equipment".	Section 9 — 109 (2).
"Farm products".	Section 9 — 109 (3).
"General intangibles".	Section 9 — 106.
"Inventory".	Section 9 — 109 (4).
"Lien creditor".	Section 9 — 301 (3).
"Proceeds".	Section 9 — 306 (1).
"Purchase money security interest".	Section 9 — 107.

SECTION 11. Section 9—310 of said chapter 106, as so appearing. is hereby amended by inserting after the word "lien", in line 3, the words:—upon goods in the possession of such person,—so as to read as follows:—

Section 9—310. Priority of Certain Liens Arising by Operation of Law.

When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise.

SECTION 12. Subparagraph (*b*) of subsection (3) of section 9—312 of said chapter 106, as so appearing, is hereby amended by striking out, in line 3, the words "has previously" and inserting in place thereof the words:—, prior to the date of the filing made by the holder of the purchase money security interest, had,—so as to read as follows:—

(*b*) any secured party whose security interest is known to the holder of the purchase money security interest or who, prior to the date of the filing made by the holder of the purchase money security interest, had filed a financing statement covering the same items

or type of inventory has received notification of the purchase money security interest before the debtor receives possession of the collateral covered by the purchase money security interest; and.

SECTION 13. Subsection (5) of said section 9—312 of said chapter 106, as so appearing, is hereby amended by inserting after the word "section", in line 2, the words:—(including cases of purchase money security interests which do not qualify for the special priorities set forth in subsections (3) and (4) of this section),—so as to read as follows:—

(5) In all cases not governed by other rules stated in this section (including cases of purchase money security interests which do not qualify for the special priorities set forth in subsections (3) and (4) of this section), priority between conflicting security interests in the same collateral shall be determined as follows:

(*a*) in the order of filing if both are perfected by filing, regardless of which security interest attached first under section 9—204 (1) and whether it attached before or after filing;

(*b*) in the order of perfection unless both are perfected by filing, regardless of which security interest attached first under section 9—204 (1) and, in the case of a filed security interest, whether it attached before or after filing; and

(*c*) in the order of attachment under section 9—204 (1) so long as neither is perfected.

SECTION 14. Section 9—402 of said chapter 106, as so appearing, is hereby amended by striking out subsection (3) and inserting in place thereof the following subsection:—

(3) A form substantially as follows is sufficient to comply with subsection (1):

Maturity Date (if any) ..... (Last Name First)	For Filing Officer Use File No. ..... Date & Hour of Filing .....

Name of Debtor ..... Address.....
Name(s) of Other Debtor(s) (if any)
..... Address.....
..... Address.....
Name of Secured Party ..... Address.....
Name(s) of Other Secured Party or Parties (if any)
..... Address.....
..... Address.....

1. This financing statement covers the following types (or items) of property:
(Describe) .....

CHECK [X] THE ITEMS WHICH APPLY

2. [ ] (If collateral is crops) The above described crops are growing or are to be grown on: (General description of real estate and name of record owner)
.....

3. [ ] (If collateral is goods which are or are to become fixtures) The above described goods are affixed or are to be affixed to: (General description of real estate and name of record owner)

.....

4. [ ] Proceeds of collateral are also covered.

5. [ ] Products of collateral are also covered.

Signature(s) of Debtor(s)	Signature(s) of Secured Party or Parties
.....	.....
.....	.....
.....	.....

SECTION 15. Subsection (3) of section 9—403 of said chapter 106, as so appearing, is hereby amended by striking out the last sentence.

SECTION 16. Subsection (5) of said section 9—403 of said chapter 106, as so appearing is hereby amended by inserting after the word "statement", in line 2, the words:—or any amendment of either,— so as to read as follows:—

(5) The fee for filing, indexing and furnishing filing data for an original or a continuation statement or any amendment of either shall be three dollars.

SECTION 17. Section 9—404 of said chapter 106, as to appearing, is hereby amended by striking out subsection (2) and inserting in place thereof the following subsection:—

(2) On presentation to the filing officer of such a termination statement he must note it in the index. The filing officer shall remove from the files, mark "Terminated", and send or deliver to the secured party the financing statement and any continuation statement, statement of assignment or statement of release pertaining thereto.

SECTION 18. Section 9—407 of said chapter 106, as so appearing, is hereby amended by striking out subsection (2) and inserting in place thereof the following subsection:—

(2) Upon request of any person, the filing officer shall issue his certificate showing whether there is on file on the date and hour stated therein, any presently effective financing statement naming a particular debtor and any statement of assignment thereof and if there is, giving the date and hour of filing of each such statement and the names and addresses of each secured party named therein. The fee for such a certificate shall be three dollars. Upon request the filing officer shall furnish a copy of any filed financing statement, continuation statement, termination statement, statement of assignment or statement of release for a fee of one dollar and, if such statement consists of more than three pages, an additional fee of fifty cents for the fourth and each succeeding page.

SECTION 19. Said chapter 106 is hereby further amended by inserting after section 9—407, as so appearing, the following section:—

Section 9—408. Destruction of Old Records.

Unless a filing officer has notice of an action pending relative thereto, he may remove from the files and destroy

(*a*) a lapsed financing statement, a lapsed continuation statement, a statement of assignment or release relating to either, and any index of any of them, one year or more after lapse; and

(*b*) a termination statement and the index on which it is noted, one year or more after the filing of the termination statement.

SECTION 20. This act shall take effect on October first, nineteen hundred and fifty-eight. *Approved August 20, 1958.*

NEW LECTURES ON THE CODE IN NOVEMBER

A new series of lectures on the Commercial Code, *now in effect in Massachusetts*, will be presented in November by the New England Law Institute. This will include much of the material covered in "Neli's" lectures on the Code last February, but with a more practical and "workshop" approach, and with considerably more time devoted to the important Article 9.

The lectures will be given on Friday, November 7 and on Friday and Saturday, November 14 and 15, 1958. The last lecture on Saturday will end in time for attendance at one of the football games that afternoon. All lectures will be in the John Hancock Hall.

The coverage of Article 9, on the new "Security Agreement" which has taken the place of all chattel mortgages, conditional sales, factor's liens, and the like, will be threefold in its application, and will include (1) specific and common problems of lawyers, (2) changes in present forms and recommendations for new forms, and (3) a detailed account of the new statutory filing requirements for all "security interests."

For lawyers who have or expect to have any legal work relating to business or commercial transactions, even those who attended the February lectures, this new series will bring a comprehensive and practical "working" instruction of the new business Code.

Detailed notices of the lectures are being mailed to all Massachusetts lawyers by the New England Law Institute, Inc., 6 Beacon Street, Boston 8, Massachusetts.

CHANGES IN CHATTEL MORTGAGE TYPE FORMS OF SECURITY AGREEMENTS

Attention is called to the changes required in security agreements in the form of chattel mortgages of "consumer goods" so as to include, as in the case of the conditional sale type of security agreement covering "consumer goods", a breakdown of charges and a statement that the finance charges are a matter of agreement between the parties and are not regulated by law.

(Code notes continued on p. 19)

NEW LEGISLATION LIMITING THE JURISDICTION OF THE FEDERAL DISTRICT COURTS IN DIVERSITY OF CITIZENSHIP AND FEDERAL QUESTION CASES

By ALAN J. DIMOND *of the Boston Bar*

Public Law 85-554, effective upon approval by the President on July 25, 1958, places important new limitations on the original and removal jurisdiction of the Federal district courts. It increases the required jurisdictional amount in Federal question and in diversity of citizenship cases from $3,000 to $10,000, and designates a corporation, for purposes of both original and removal jurisdiction based on diversity of citizenship, as a citizen not only of the state of its incorporation but also of the state where it has its principal place of business.[1] This legislation, the first since 1911 increasing the jurisdictional amount, was the result of careful studies and recommendations of the Judicial Conference of the United States, the Administrative Office of the United States Courts, and the Judiciary Committees of the House and Senate. Quoted below are excerpts from the report of the Senate Judiciary Committee explaining the background and purposes of the changes.

The new legislation makes no change in the existing rules that the sum claimed by the plaintiff, if the claim is "apparently made in good faith", determines whether the "matter in controversy" exceeds the required jurisdictional amount, and that the mere failure of the plaintiff to recover a sum in excess of that amount does not show bad faith or oust the court of its jurisdiction.[2] In an attempt, however, to prevent the filing of inflated claims, even though they may meet the generous jurisdictional test of apparent good faith, the new legislation states that if the plaintiff fails to recover $10,000, computed without regard to any setoff or counterclaim, and exclusive of interest and costs, the court may deny him an award of costs and may add the further sanction of an assessment of costs against him as well.

A consequence of the new legislation is a change in the jurisdictional allegations now apparently made necessary in drafting a complaint in a diversity case involving a corporate party. Since

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[1] Another section of the new act prohibits removal of actions commenced in state courts under state workmen's compensation acts. This section has application only to states like New Mexico, where workmen's compensation claims are filed directly in the courts rather than with an administrative board or commission. See *Fresquez* v. *Farnsworth and Chambers Company*, 10th Cir., 238 F. 2d 709. Compare *Decker* v. *Spicer Manufacturing Division of Dana Corp.*, D.C.N.D., Ohio, 101 F. Supp. 207, holding that workmen's compensation cases were not removable where the state's compensation system was organized around an administrative board or commission. To like effect see *Snook* v. *Industrial Commission of Illinois*, D.C.E.D., Ill., 9 F. Supp. 26.

[2] *St. Paul Mercury Indemnity Co.* v. *Red Cab Company*, 303 U. S. 283, 288; *Fireman's Fund Insurance Co.* v. *Railway Express Agency*, 6 Cir., 253 F. 2d 780, 782; *Colonial Oil Company* v. *Vining*, 5 Cir., 237 F. 2d 913.

Rule 8(a) of the Federal Rules of Civil Procedure requires a statement of the grounds of the court's jurisdiction, it would now seem insufficient merely to allege the state of incorporation of a corporate party. From now on the possibility of dual corporate "citizenship" would seem to require the further allegation of the state where a corporation has its principal place of business. Similarly, petitions for removal of diversity of citizenship cases from a state court to a Federal court will apparently have to include allegations of the principal place of business of each corporate party.[3]

A further consequence of the legislation is that plaintiffs in state court actions possessing either the diversity of citizenship necessary for removal to a Federal court[4] or the existence of a Federal question[5] may allege demands not in excess of $10,000, exclusive of interest and costs, and thereby avoid exposing their cases to removal. Under the old $3,000 limitation, most plaintiffs, especially in tort cases, gave little concern to this method of keeping a case in a state court. But now with the increase of the jurisdictional amount to $10,000, this method assumes a new importance. If it is used, a plaintiff should remember that if he subsequently amends his claim to a demand for more than $10,000, exclusive of interest and costs, he will thereby expose his case to removal as though the increased amount were the amount of his original claim.[6]

The following passages from the report of the Senate Judiciary Committee should be read.

Excerpts from Senate Report No. 1830, 85th Congress, 2d Session

STATEMENT

In the years following World War II the judicial business of the United States district courts increased tremendously. Total civil cases filed are up 75 percent and the private civil business has more than doubled in the districts having exclusively Federal jurisdiction.

Most of the increase has occurred in the diversity of citizenship cases, which have increased from 7,286 in 1941 to 20,524 in 1956. A large portion of this caseload involves corporations. Of the 20,524 diversity of citizenship cases filed in the district courts during fiscal 1956 corporations were parties in 12,732 cases, or 62 percent. This percentage is almost identical with the fiscal years 1951 and 1955.

In an effort to meet this heavy increase in the caseload, Congress since World War II has increased the number of district judges by 51. However, the appointment of additional judges has not removed many of the basic factors in this problem of increased litigation. In

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[3] 28 U.S.C. sec. 1446(a) requires a removal petition to contain "a short and plain statement of the facts" which entitle a party to removal.

[4] If a defendant is a citizen of the state in which the action is brought, there can be no removal on the ground of diversity of citizenship. 28 U.S.C. sec. 1441(b).

[5] Note, however, the limited scope of true "Federal question" cases. See the annexed excerpts from the report of the Senate Judiciary Committee at page .... of this article.

[6] *Great Northern Railway Co.* v. *Alexander*, 246 U. S. 276, 281; *Journal Publishing Co.* v. *General Casualty Co.*, 9 Cir., 210 F. 2d 202, 204.

a further effort to relieve the situation, the Judicial Conference of the United States in 1950 undertook to study the overall problem of jurisdiction and venue, and as a result made the following recommendations which are incorporated in the present legislation:

(1) That the historic jurisdiction based upon diversity of citizenship jurisdiction be retained in the Federal courts.

(2) That section 1332 of the Revised Judicial Code be amended to provide that in cases based upon diversity of citizenship jurisdiction a corporation shall be deemed a citizen both of the State of its creation and the State in which it has its principal place of business.

(3) That the jurisdictional amounts prescribed by sections 1331 and 1332 of the Revised Judicial Code as requisite for Federal jurisdiction in cases based upon diversity of citizenship or a Federal question be raised from $3,000 to $10,000.

In 1957 hearings were held by a subcommittee of the House Judiciary Committee on bills containing, among other things, these recommendations. Because of the widespread effect of this legislation, the committee felt that rather than take action at that time a committee document should be compiled, made up of the hearings, Government agency reports and other pertinent data and that such document be made available to interested organizations so that the views of all concerned could be obtained and studied by the House Judiciary Committee during the last congressional recess (hearing, serial 5, House Committee on the Judiciary, 85th Con.). As a result of the suggestions received certain changes were made in the legislation, although the basic provisions recommended by the Judicial Conference have been kept.

In adopting this legislation, the committee feels that it will bring the minimum amount in controversy up to a reasonable level by contemporary standards and that it will ease the workload of our Federal courts by reducing the number of cases involving corporations which come into Federal district courts on the fictional premise that a diversity of citizenship exists.

JURISDICTIONAL AMOUNT

The recommendations of the Judicial Conference regarding the amount in controversy, which this committee approves, is based on the premise that the amount should be fixed at a sum of money that will make jurisdiction available in all substantial controversies where other elements of Federal jurisdiction are present. The jurisdictional amount should not be so high as to convert the Federal courts into courts of big business nor so low as to fritter away their time in the trial of petty controversies. The present requirement of $3,000 has been on the statute books since 1911 and obviously the value of the dollar in terms of its purchasing power has undergone marked depreciation since that date. The Consumers Price Index for moderate income families in large cities indicates a rise of about 152 percent since 1913, shortly after the present $3,000 minimum

was established. It is apparent that since $3,000 was the smallest amount that was considered substantial in 1911 for problems of Federal jurisdiction, there is today no substantiality in such an amount for jurisdictional problems. Accordingly the committee believes that the standard for fixing jurisdictional amounts should be increased to $10,000.

DIVERSITY OF CITIZENSHIP BY CORPORATIONS

It is now established doctrine that a corporation, for the purposes of jurisdiction, is deemed a citizen of the State in which it is incorporated (*St. L. and S. F. Ry. Co.* v. *James*, 161 U. S. 545 (1896)).* It is by virtue of this rule, which is now long standing and thoroughly imbedded in our jurisdiction, that so-called out-of-State corporations may sue and be sued under the diversity jurisdiction where it is suing or being sued by a citizen of a State other than the State of its incorporation.

This fiction of stamping a corporation a citizen of the State of its incorporation has given rise to the evil whereby a local institution, engaged in a local business and in many cases locally owned, is enabled to bring its litigation into the Federal courts simply because it has obtained a corporate charter from another State. (*See Black and White Taxicab and Transfer Company* v. *Brown and Yellow Taxicab and Transfer Co.*, 276 U. S. 518 (1928) .) This circumstance can hardly be considered fair because it gives the privilege of a choice of courts to a local corporation simply because it has a charter from another State, an advantage which another local corporation that obtained its charter in the home State does not have.

The underlying purpose of diversity of citizenship legislation (which incidentally goes back to the beginning of the Federal judicial system, having been established by the Judiciary Act of 1789) is to provide a separate forum for out-of-State citizens against the prejudices of local courts and local juries by making available to them the benefits and safeguards of the Federal courts. Whatever the effectiveness of this rule, it was never intended to extend to local corporations which, because of a legal fiction, are considered citizens of another State. It is a matter of common knowledge that such incorporations are primarily initiated to obtain some advantage taxwise in the State of incorporation or to obtain the benefits of the more liberal provisions of the foreign State's corporation laws. Such incorporations are not intended for the prime purpose of doing business in the foreign State. It appears neither fair nor proper for such a corporation to avoid trial in the State where it has its principal place of business by resorting to a legal device not available to the individual citizen.

Because of these circumstances, and others, the Judicial Confer-

* ["The jurisdiction does not rest on the corporation being a citizen, for it is not, but on the presumption, which is a pure fiction, but which cannot be disputed or traversed, that all its stockholders are citizens of the particular State where the corporation was organized." Bunn, Jurisdiction and Practice of the Courts of the United States, 5th ed., page 45. A. J. D.]

ence of the United States has recommended that the law be amended so that a corporation shall be regarded not only as a citizen of the State of its incorporation but also as a citizen of the State in which it maintains its principal place of business. This will eliminate those corporations doing a local business with a foreign charter but will not eliminate those corporations which do business over a large number of States, such as the railroads, insurance companies, and other corporations whose businesses are not localized in one particular State. Even such a corporation, however, would be regarded as a citizen of that one of the States in which was located its principal place of business.

The proposal to rest the test of jurisdiction upon the "principal place of business" of a corporation has ample precedent in the decisions of our courts and in Federal statute such as the provisions of the Bankruptcy Act (11 U. S. C. 11). There is thus provided sufficient criteria to guide courts in future litigation under this bill.

EFFECT ON CONTRACT [TORT] AND ON "PRINCIPAL PLACE OF BUSINESS" DIVERSITY CASES

Statistics submitted by the Administrative Office of the United States Courts . . . show the total number of cases which would be affected by the proposed $10,000 increase in the jurisdictional amount in diversity of citizenship cases. According to its tables the increase would eliminate an estimated 38.2 percent of the contract cases. This estimate should be fairly accurate since the amount claimed in contract actions is usually the actual damages sustained under the contract.

With regard to tort actions, the statistics submitted may not accurately reflect the true situation because in tort cases the amount claimed oftentimes bears little relation to the actual recovery. If plaintiffs, in the cases surveyed, were faced with a $10,000 limit at the time they filed suit they doubtless would in many cases have claimed that amount instead of the present $3,000. In any event on the basis of the amounts claimed in the pleadings the proposed increase would eliminate an estimated 10 percent of the tort cases.

To make the $10,000 limitation a forceful one and to prevent inflated claims, the House Judiciary Committee has inserted a subsection permitting the trial judge to either withhold costs and/or impose costs on the plaintiff if the plaintiff fails to obtain a judgment for at least the jurisdictional amount. This provision will apply only to amounts determined by a verdict or a final judgment decided by the court; not to compromise agreements. In deciding whether to deny costs and/or impose costs on the plaintiff, the court will undoubtedly take into consideration whether the amount claimed was made in good faith or whether it was made simply to get into Federal court. It will also take into consideration the fact, if it be a fact, that the plaintiff's net recovery has been reduced by setoff or counterclaim, the validity of which the plaintiff contested in good faith.

With regard to the matter of a corporation's "principal place of business," the Federal rules do not require that such information appear in the pleadings and the information is seldom mentioned.** Figures assembled as the result of a recent survey, while showing considerable variation, indicate that from 3.6 to 23.5 percent of such cases will be eliminated.

"FEDERAL QUESTION" CASES [THEIR LIMITED SCOPE]

While this bill applies the $10,000 minimum limitation to cases involving Federal questions, its effect will be greater on diversity cases since many of the so-called Federal question cases will be exempt from its provisions. This is for the reason that Federal courts are expressly given original jurisdiction without limitation as to the amount claimed in a great many areas of Federal law. For example, regardless of the amount claimed, the Federal courts have jurisdiction in copyright, patent, and trademark cases. Employees Liability Act, Fair Labor Standards Act, antitrust, ICC, freight rate, and many other types of cases coming under our commerce acts also give original jurisdiction to the Federal courts without limitation as to the amount involved. Other types of cases are admitted to the Federal courts without regard to the jurisdictional amount by special Federal statutes as, for example, suits involving civil rights, and suits under the Miller Act. When all of these types of cases are eliminated, the only significant categories of "Federal question" cases subject to the jurisdictional amount are suits under the Jones Act and suits contesting the constitutionality of State statutes. In both of these types of cases the amount claimed usually exceeds $10,000.

Uniform Commercial Code—Continued from p. 13

READ THE "DEFINITIONS" IN THE CODE

A disturbed architect asked us the other day about Section 9-318 (4) which reads

> "A term in any contract between an account debtor and an assignor which prohibits assignment of an account or contract right to which they are parties is ineffective."

Some one had told him that allowed assignment of the whole contract. We referred him to the definition of "contract right" in Section 9-106, "Any right *to payment* not yet earned by performance" and he felt better. As in the case of Chapter 4 of the General Laws (which some lawyers seem to forget) it pays to read *statutory definitions.* F. W. G.

** [From now on, however, it would seem that such information will be a required jurisdictional allegation. A. J. D.]

NOTES ON PLANNING AND ZONING AT THE ANNUAL MASSACHUSETTS LAWYERS' INSTITUTE JUNE 13, 1958

By

RICHARD B. JOHNSON

I can contribute another illustration to Mr. Muldoon's thesis* that zoning and planning power is frequently used by local authorities to discourage the growth of their particular community with its consequent increase in expensive services.[1] A certain town, on getting wind last year of a proposed development in a residential area, held a special town meeting and re-zoned the area "for industry only," two months after confirming the area's residential nature by increasing the minimum lot size from 15,000 to 18,000 square feet. This was a shrewd move, because there is nothing wrong, on the face of it, in zoning for industry. Other towns in Massachusetts have done it, and although our Court has not passed on it, it has been sustained in appropriate circumstances elsewhere.[2] If it is not reasonable under all the circumstances, it will not be sustained.[3] Our Court was spared the question in this situation, because the voters at large, on a referendum, defeated the re-zoning. Whether they had a collective conscience more sensitive than that of the town meeting members, or whether they merely considered light industry to be worse than a development, we will probably never know.

In situations like this, and like those cited by Mr. Muldoon, the owner of the land affected is apt to invoke the Spirit of '76 and proclaim that the town has invaded his ancient, inalienable rights.[4] The town, on the other hand, will invoke an equally ancient principle of home rule and the right of a New England town ("The epitome of democracy") to defend itself against invasion. Year after year, these are the battle cries that echo through the corridors of the State House as legislation is proposed to enlarge or restrict or review the zoning and planning powers of the towns.

A perennial among these proposals is one to fix a maximum minimum lot size at 10,000 or 15,000 square feet. To date, such a proposal has failed to pass. As we all know, the Court has refused to invalidate a by-law restricting parts of Needham to one-acre lots, making "no intimation that, if the lots were required to be larger than an acre or if the circumstances were even slightly different, the same

* Mr. Muldoon's discussion appeared in the "Quarterly" for July, 1958, pp. 13-18.

[1] XLIII(2) M.L.Q. 13 et seq. (1958).

[2] *Kozesnik* v. *Montgomery Township*, 131 A.2d 1 (N. J. 1957). See also *Katobimar Realty Corporation* v. *Webster*, 118 A.2d 824 (N. J. 1955).

[3] *Corthouts* v. *Newington*, 99 A.2d 112 (Conn. 1953); *Comer* v. *City of Dearborn*, 70 N.W.2d 813 (Mich. 1955); *Roney* v. *Board of Supervisors of Conta Costa County*, 292 P.2d 529 (Calif. 1956).

[4] But see the 1632 Cambridge zoning cited by Professor Haar in the Foreword to the Symposium on Zoning in New England, 36 B.U.L.R. 331 (1956).

result would be reached."[5] We all also know that many towns are tempting fate by adopting as much as two-acre minimum lot sizes. So far, neither Court, Supreme Judicial or Great and General, has spoken on this. In Pennsylvania, however, one-acre zoning has recently had a narrow squeak. Invalidated once, it was reinstated by a reversal on rehearing, by a four to three decision.[6]

Other recurrent proposals for limiting the zoning power of towns are proposals to put planning on a regional basis, either from the beginning, or by way of review, on appeal from decisions of local authorities. To the extent that suburbs establish iron rings around a city, preventing the outward migration of population except on a two-acre basis, they are taking chances on mounting pressures which may some day explode the whole principle of home rule in such matters.[7]

So far, the only legislative step toward regional planning is contained in Chapter 40B of the General Laws. This is entirely voluntary and advisory, and yet is seems significant that even though federal funds for such planning are available under Title 7 of the Housing Act of 1954, only one region—Southeastern Massachusetts —has been organized under Chapter 40B.

Planning in Massachusetts has historically been treated as if it were something different from zoning. Zoning was, for a long time, wedged uncomfortably into Chapter 40 of the General Laws. (Now, of course, it has a room of its own in Chapter 40A.) Planning, under the label "Subdivision Control" has been, and still is, wedged even more uncomfortably into Chapter 41. Actually, both are devices for controlling the use of land. Zoning says to the land owner *(inter alia):* "You shall use your land only for houses that have adequate front yards." Planning, in the narrow sense of the activities described in the Subdivision Control Law, says "You shall use your land only for houses that have adequate streets in front of the front yards." Planning in the broad sense includes the use of both devices, and neither should be used without planning in the broad sense. (As Mr. Muldoon suggests, there is reason to believe that sometimes the only plan is a plan to preserve the *status quo.)*

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[5] *Simon* v. *Needham*, 311 Mass. 560 (1942).

[6] *Bilbar Construction Co.* v. *Board of Adjustment,* Pa. , 141 A.2d 851 (May 2, 1958, rehearing denied May 27, 1958). The dissent claims that the majority must "predicate its conclusion on the doctrine of *unlimited* police power—a doctrine which is repugnant to our birthright of Liberty, our traditions, our Constitution, and our American Way of Life." The earlier decision, which was reversed on rehearing, does not seem to be reported in the Atlantic Reporter. In searching for it, I came across another decision of interest: that the preparation of synthetic horse manure for the cultivation of mushrooms is not manufacturing but agriculture. *Gaspari* v. *Board of Adjustment of the Township of Muhlenberg,* Pa. , 139 A(2d) 544 (1958). Against this we have a Massachusetts decision that raising greyhounds for racing is not farming. *Mioduszewski* v. *Saugus,* Mass. Adv. Sh. 385 (1958).

[7] See *Simon* v. *Needham*, 311 Mass. 560, 565-6 (1942). "A zoning by-law cannot be adopted for the purpose of setting up a barrier against the influx of thrifty and respectable citizens who desire to live there and who are able and willing to erect homes upon lots upon which fair and reasonable restrictions have been imposed nor for the purpose of protecting the large estates that are already located in the district. The strictly local interests of the town must yield if it appears that they are plainly in conflict with the general interests of the public at large, and in such instances the interest of 'the municipality would not be allowed to stand in the way'."

The formal distinction between zoning and subdivision control should not blind us to the substantial similarity. Conversely, the substantial similarity should not blind us to the formal differences, because the formal differences can be booby traps.

For example, laymen are apt to confuse the planning board, acting under Chapter 41, with the board of appeal acting under Chapter 40A, and assume that an endorsement of a plan by the planning board, "Approved" or "Approval not required," means that all planning and zoning problems have been taken care of. To avoid this, planning boards have sought to qualify the endorsement, particularly when one or more of the lots on a plan is too small to build on under the zoning law. This overlooks the fact that land *can* be divided for other than building purposes. If the divider wants to put a flower garden on the small lot it is not correct for the planning board to emblazon the plan with "This violates the Zoning By-Law." The by-law may not be violated until some improper use is made. It is said that land is not frequently divided just for flower gardens, but that it not so. It *is* frequently divided for purposes of boundary adjustment, and for lawns and gardens, not for building.[8] Since a plan which purports to adjust a boundary *might* be used improperly for a conveyance to a stranger, it is proper for the board to restrict its endorsement accordingly, or to make it clear that it is not passing on the application of the zoning by-law. It should not jump to the conclusion that a zoning violation is contemplated, and ruin a perfectly good plan.[9]

An important difference between planning and zoning which has no foundation in substance whatever, that I can discern, is in the fact that planning boards can act by a majority,[10] or even by inaction,[11] whereas boards of appeal must act unanimously, or nearly unanimously.[12]

Another procedural difference between planning and zoning has recently been eliminated by the legislature. Chapter 41, § 81BB provides that "any person, whether or not a party to the proceedings, aggrieved by . . . any decision of a planning board . . . may appeal to the superior court . . . within twenty days. . . ." Chapter 40A, § 21 used to provide that "any person aggrieved by a decision of a board of appeals, whether or not previously a party to the proceedings . . . may appeal to the superior court . . . within *fifteen* days. . . ." Chapter 175 of the Acts of 1958 removed this possible booby trap by making it twenty days for zoning appeals, too.

The excerpts just quoted are so closely parallel that it is not entirely surprising to find the Court construing "any person aggrieved"

[8] Such a division is expressly excluded from the definition of a subdivision (G. L. c. 41, § 81L), and hence approval is not required.

[9] The writer has had experience, in practice, with one side of this problem. He recently acquired a large dose of the other side of the problem when he served as a panelist at the Annual Meeting of Region 5A of the Massachusetts Federation of Planning Boards.

[10] G.L. c. 4, § 6.

[11] G.L. c. 41, § 81P and § 81U.

[12] G.L. c. 40A, § 19. See *Sesnovich* v. *Board of Appeal of Boston*, 313 Mass. 393 (1943).

in the Subdivision Control Law to include a mortgagee of adjacent premises as it would under the Zoning Enabling Act.[13] The Court is further supported in this by the substantial resemblance described above. If a substandard street hampers garbage collection and fire prevention, then substandard streets are potentially a nuisance to the neighbors, and the neighbors, not just the town officials charged with fire prevention, etc., are "aggrieved." This reasoning, however, is not consistent with the rationale of our present system of subdivision control, which is based on preventing the creation of new streets that are substandard, but which permits "ribbon development" on old public streets even though they may be little more than cart tracks.

Here, indeed, is another curious difference between zoning and subdivision control. The former applies to all the land in a district; the latter applies only to such land as cannot be reached without the construction of a new road. The *Carey* case suggests that the distinction is not required.

Zoning by-laws must be adopted by a town meeting by a majority vote (and, for some reason, amended by a two-thirds vote).[14] Planning board regulations, on the other hand, are adopted and amended by a majority vote of the board.[15] The planning board must make a report and recommendation before any zoning by-law is adopted or amended,[16] but thereafter the board of appeals has what power there is to vary it[17] or to grant special permits thereunder.[18] That this is confusing is evidenced by the number of towns whose zoning by-laws purport to give special permit powers to the planning board.[19]

In fact, the planning board, having made its recommendation to the town meeting which adopts or amends the zoning by-law, is thereafter sternly forbidden to tinker with zoning in the guise of adopting regulations, "except insofar as it may require compliance with existing zoning ordinances or by-laws."[20] At the same time, § 81R expressly authorizes planning boards to waive strict compliance with its rules and regulations. A conscientious planning board will try to exercise this power in a reasonably uniform manner, so as to enable developers to make their plans, and to protect the board against charges of capriciousness and favoritism. It is hard to see how the board is going to do this without building up at least an unwritten body of rules, based on precedent, that squarely relate to the size and use of lots. In adopting regulations in the first instance, the board obviously has to anticipate that the development will contain the maximum number of house lots permitted by the

[13] *Carey* v. *Planning Board of Revere*, 335 Mass. 740, 743 (1957).
[14] Chapter 40A, §§ 6 and 7.
[15] Chapter 41, § 81Q. It is argued that planning board regulations are too technical for comprehension by voters or town meeting members, but they are no more technical than the plumbing and wiring by-laws adopted at town meetings.
[16] Chapter 40A, § 6.
[17] Chapter 40A, § 15.
[18] Chapter 40A, § 4. References to boards of appeal include, for brevity, boards of selectmen acting as boards of appeal.
[19] Such a delegation is invalid. *Coolidge* v. *Planning Board of North Andover*, Mass. Adv. Sh. p. 959 (1958).
[20] Chapter 41, § 81Q.

zoning law. It is hard to think of any relevant and proper reason for waiving strict compliance with the regulations other than a guarantee that less than the maximum number of houses will be served by the road. So here we have the board making unwritten rules relating to the size and use of lots. It would seem better to me if they were allowed to put these rules in writing.

Is there any real reason, other than historical happenstance, for the existence of two enabling acts, two sets of local regulations, two local boards to administer them, and all the curiosities described above, which spring from these separate approaches to what are essentially facets of the same subject?

It has been suggested that the doctrine of separation of powers applies,[21] and it is true that there is merit in encouraging a maximum number of citizens to participate in the work of running a town. However, logic and clarity in the division of functions is essential to the proper application of the doctrine, and encouraging citizens to participate can be carried too far. Better to this end have one board twice as big than two boards than can operate at cross-purposes.

One last difference between zoning and subdivision control is a difference of substance which would remain through any change of form. Zoning is negative. "Thou shalt not. . . ." Subdivision control purports to provide machinery whereby the planning board may compel an applicant to construct the ways shown on his plan, with the required utilities, and authorizes it to exact a bond, or other security, to secure performance.[22] This raises some interesting questions for which we have no answers yet.

When, if ever, can the applicant change his mind and abandon the whole project? While it is still in the paper stage? It is hard to see what vested interest the town could have acquired at this stage which would be impaired by abandonment. Suppose he gets halfway through the project? It is easier to say that he ought not to turn back now. But what is the town's vested interest—or damage? The town may be under political pressure from articulate residents to finish the job, but it is not legally bound to. What is the measure of damages?

Chapter 41, § 81U, has been extensively overhauled this year,[23] and considerable improvement has been made, but these problems have not yet been entirely resolved. The machinery for clearing the plan with the board of health is clarified; provision is made for extending by agreement the period (formerly 45, now 60, days) within which the planning board must act; and detailed provision is made for reduction and release of the security required.

However, the section still contains a provision for a restraint (formerly a condition, now a covenant) against transfer (formerly "sell," now "convey") of a lot before the ways and services are installed.

[21] Tilden, Planning or Plodding and Zoning, XLI(3) M.L.Q. 26 (1956).
[22] Chapter 41, § 81U.
[23] St. 1958, c. 377

This formerly left unanswered the question whether a deed in violation of the restraint was void or merely voidable, and if the latter, by whom. From a conveyancer's point of view, this could hardly be considered good drafting. Now the section contains an express provision that such a deed shall be voidable by the grantee prior to the release of the covenant but not later than three years from the date of the deed. An exception to the restraint has been added, in favor of mortgage deeds. The intent was to facilitate the financing of the construction, but the only effect seems to be to deprive mortgagees of the remedy of rescission.

The covenant is described as one which will run with the land, but by hypothesis there are two parcels of land involved: the parcel conveyed and the parcel retained by the grantor. Which parcel is to bear the burden does not seem to have been decided, nor have we an answer to the subsidiary question as to how far, if at all, one individual is to be responsible for the omissions of his predecessors or successors in title.

The covenant is stated in the passive mood: "Such ways and services shall be provided to serve any lot before such lot may be built upon or conveyed. . . ." There may be ambiguities here as to whether this imposes an affirmative obligation on the covenantor and some or all of his successors, or merely a negative restraint on building and conveying.

Chapter 381 of the Acts of 1958 amends Section 15 of Chapter 40A (authorizing the granting of variances) by inserting the words "financial or otherwise" after the word "hardship." Heretofore, "The financial situation or pecuniary hardship of a single owner affords no adequate ground for putting forth this extraordinary power affecting other property owners as well as the public."[24] It remains to be seen what "financial hardship" means. Merely that the property is worth more with the variance? If so, it seems superfluous to mention, since it is hard to conceive of an application for a variance in which this factor would not exist.

Chapter 206 of the Acts of 1958 provides for the submission to the planning board of a preliminary plan (defined in the Act), and protects it "and the definitive plan evolved from it" against subsequent changes in the planning rules and regulations provided the definitive plan is submitted within seven months.

Chapter 207 of 1958 forbids the recording of a plan until it has been approved by the planning board *and* the city or town clerk certifies that the twenty-day appeal period has elapsed without appeal. This will substantially affect the time table for a lot of real estate transactions.

Chapters 201 and 202 provide for the appointment of associate members of planning boards and boards of appeals.

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[24] *Blackman* v. *Board of Appeals of Barnstable*, 334 Mass. 446 (1956). Compare *Kairis* v. *Board of Appeal of Cambridge*, Mass. Adv. Sh. 813 (1958) in which the trial judge found "extreme pecuniary hardship." The Court held that he could conclude that there was hardship and sustained the variance.

THE TWO FOLD RESPONSIBILITY OF THE LAWYER

An Address at the Lawyers Institute in Plymouth, June 14, 1958.

By

HON. DONALD M. MACAULAY

As the twenty-ninth in rank of the thirty-two justices presently constituting the Superior Court, I was somewhat bewildered, and still am, that your association extended me an invitation to talk to you about the mutual and reciprocal interests of lawyers and the courts in the ever increasing problems of rendering justice in this Commonwealth. I feel that the continued cooperation of the bench and bar to meet the challenging demands of the public for the more expeditious and efficient disposition of litigation *must continue and even increase to a much greater extent* in the years that lie before us.

The present program of the Superior Court to relieve congestion has been thought by many to be of a temporary nature. Many trial lawyers are anticipating the day when their practice will be comparably easy going. But I am not one of those who believe that future trial work, with its strains and stresses, will abate to any degree in the future. The evidence points to the contrary. Motor tort cases will continue to increase at alarming rates simply because there are and will be more cars on the road. In my own County of Hampden, the entries of new cases in the first five months of 1958 increased at a rate of 52 per cent over the comparable period in 1957. Planned highway improvements in this Commonwealth, it has been estimated, will necessitate takings of 5000 parcels of land within the next five years. The population increases that have had such great effect on the expansion of our school systems will have like effect on the exapnsion of the business of the courts.

The courts, in the first instance, will have the responsibility of adopting plans and procedures to prepare and meet this greater influx of litigation. And, moreover, the courts, in the first instance, must adapt their work in a manner to meet the rising demands of the public for more efficiency. Lawyers, not only as officers of the court, but also to gain public esteem, will have to make greater and greater endeavors cooperating with the courts to prevent our judicial system from becoming mired in bogs of ineptitude that would result in the denial of justice to the people.

Under the guidance of Chief Justice Reardon, the Superior Court has made great progress in relieving congestion, the extent of which will be announced this summer after the official reports for the year ending June 30th are compiled. But this never could have been accomplished without the cooperation of the bar,—cooperation of such an extent that many trial lawyers never dreamed possible two years ago. The justices have certainly appreciated it.

The public has appreciated it. But from all the indications of what lies ahead, the litigation that we will have in our courts in the coming years will change to a revolutionary degree the art of advocacy as the art of advocacy has been considered by the outgoing generation of trial lawyers. The change has already started. It began with pre-trial procedures in the thirties. It has gained great impetus since 1955. And it will continue with greater impetus because of modern progress in the economy of this country, the ever increasing population, and the ever increasing demands of the public for prompt and efficient dispatch of justice. People accustomed to the non-procrastinating practices of modern day businesses and even the jet speed ways of modern day living are of a generation that do not even remember the phrase "horse and buggy days." They are intolerant of dilatory systems and processes.

I noticed in preparing for this talk that judges in giving addresses and writing articles for the law journals about the relationship of the bench and bar have almost invariably given discourses on the ethical standards to be maintained between them. They are important. But since they were so clearly set forth in the Standards of Trial Conduct that appeared in the Massachusetts Law Quarterly last July, because of the limitations of time, and because I believe that the problems that will arise between counsel and the courts in the coming years in respect to cooperation are important, will you permit me to forego talking at length about ethics except as they apply to expected problems of cooperation.

It is fundamental that courts and attorneys, as officers of the courts, are responsible to the people of the Commonwealth for the proper administration of justice just as much as the other two branches of government are responsible to them in their respective fields. The courts have a constitutional duty to conserve and maintain the public interests in the administration of justice. And as officers of the courts, part and parcel of the judicial process, attorneys at law practice a profession to aid individuals to obtain justice. Lawyers do not conduct a trade. They are not hacks at the beck and call of any opportunist that may come along seeking a lawyer's aid to carry out his whims and wishes. They are the sworn executors of a dual trust,—a dual trust imposed on all attorneys at law. "They must act with all good fidelity both to the courts and their clients." In the heat of law practice and demanding clients, sometimes lawyers may subordinate the duty of fidelity and cooperation they owe to the courts to that they owe their clients. It may be in some cases, they might reverse the process. But what I would like to emphasize here is that in the years ahead this "dual and finely balanced responsibility of the modern lawyer to his client and to the cause of justice" will present more delicate and challenging situations than you have experienced in the past. This will come about because the public will demand more prompt and speedy disposition of litigation in the courts which will, in turn, require the

courts to seek more and more cooperation from counsel to reduce their docket loads.

The people are becoming louder and louder in their criticism of the administration of justice because they feel it is too slow, that delays are unwarranted, and such procrastination is a positive denial of justice. The public has always believed that litigants are entitled to prompt justice in the courts; that trials are too long; that they are too expensive and too technical; and they are greatly disliked. The people are "fed up" with routine civil cases, one law journal writer says, and, so much so, that many business concerns have turned from the processes of law to settle their disputes by less complicated methods, investigating the facts themselves, and, either by arbitration or around a conference table, they settle their disputes. Laymen do not understand, when they are unable to settle cases, why they have to wait unreasonable periods of time just to obtain a trial.

Lawyers are fond of explaining to laymen that the courts alone are to blame because of the crowded conditions of the docket. But I agree with the noted writer of the article in the American Bar Journal last February that one of the most serious causes of delay has been and still is the attitude of a great majority of lawyers. Most lawyers, he wrote, do not consider delay of enough importance to do anything about it; they do not believe that justice delayed is necessarily justice denied; they do not believe that delays work injustices; they like delay; it is a convenience to them. And other lawyers believe that those who suffer real hardship are very few. You and I know that that attitude of many lawyers is true. For answer to that, let me quote from a statement of Mr. Justice Brennan of the United States Supreme Court, who said: "There is nothing fanciful about hardship and suffering caused to unfortunate victims of such delays, nor unreal about inadequate settlements which they are frequently forced to accept on that account."

In the thirties, the courts inaugurated the pre-trial systems. It was heralded as "the bastard of the law" and more than that, a "premature bastard." Some noted lawyers bewailed that pre-trial was the end of advocacy, "since everything had to be threshed out and not only were there no surprises left for trial, but practically no trial left." But pre-trial has certainly proven that there is no end to advocacy in Massachusetts. It has accomplished much in the disposition of cases, but the number of hard core cases left for trial over-taxed the capacity of the jury trial courts to the extent that twenty District Court judges were called in to help and forums were provided by the extensive use of the auditor system. Pre-trial has failed where pre-trial hearings were held too far in advance of actual trial dates. Without the threat of immediate trials, lawyers simply went through the motions knowing that they did not have to get prepared immediately and they would still have more time to bargain. In Worcester and Hampden Counties for the past year and a half, pre-trial programs have been suspended and the trial jus-

tices adopted in substitution for it the conference system, which in effect were pre-trials, but pre-trials held three to four days before the actual trial dates. The conference system has worked very well because cases the parties intended to settle all along were settled when the time for bargaining had expired, and the remaining hard core cases, called for fairly immediate trial, kept the jury sessions in full operation with little loss of jury time.

In this Commonwealth less than six per cent of the civil cases entered in court wherein jury trials are claimed, are actually tried before juries. And this rate is high compared to the rates of other jurisdictions where the rate is generally two per cent. That means that ninety-four per cent of the cases entered in court are settled. Thousands of parties who enter cases or file answers never intend when they file their pleadings to actually try the cases. They even shrink from the thought of trial. The processes of the court are used only to bargain. Pleadings are designed and processes employed not for the trial of issues but as maneuvering tactics to obtain better positions when eventually demands or offers are made to adjust the differences between the parties. Plaintiffs' attorneys are imbued with the conviction that juries will give larger verdicts, they know that jury trials take more time to try and they know that the defendants know that, and they feel there is a much better chance to settle a case where jury trial is claimed because of the dislike of defendants to try jury cases. And there are many insurance companies and individuals and corporate defendants, who still believe that the longer the time that they can delay the case the better are the advantages to them at the bargaining table, even when they know, from the time the writ is served, that they are going to settle the case.

All this has resulted in a decided change in the art of advocacy. The court room still remains the forum of the modern day lawyer for the trial of the so-called hard core cases. But, increasingly, the forum of the successful modern day lawyer has become the pre-trial sessions or conferences in the chambers of the trial judges. The purpose of all law cases must be the disposition of the controversy and as soon as possible. And when you realize that 16 out of every 17 cases brought into court are settled or disposed of without court trial, the importance of this part of judicial service in providing the processes to effect settlements becomes all the more important. Most judges I know would much rather try cases in court rooms than to do pre-trial conference work that the modern legal practice requires. But it is demanded by the usages and practices of the law of these times and I am afraid it will increase in use in the future.

The noted trial lawyer, Melvin M. Belli of California, wrote in an article appearing in the Cornell Law Quarterly: "It is the advocate's duty to settle a law suit without taking his client into court, just as much as it is the doctor's duty to heal, when possible, by medicine rather than by the scapel. The latter, like the lawsuit, is

not only more painful, more expensive, but it takes longer to recover therefrom."

The disposition of cases by settlements requires the highest type of advocacy. The client in a civil case is not particularly interested in the forensic accomplishments his lawyer displays trying a case. What he wants is to know how much is coming to him and when, or how much he has to pay. To render the best service to his client, the highest skill must be employed by counsel in settlement conferences.

The preparation of a case for pre-trial, or for a conference in chambers before trial starts, should be just as meticulous and as searching and as exhaustive as the preparation counsel makes for actual trial. Counsel should know every fact on liability, every element of damage, every point of law that might be in controversy; and counsel should present their demand, their offer, or denial of liability with confidence that they can reasonably sustain the position they take. The consequences of coming unprepared to a pre-trial hearing or a conference will too often raise such doubts in the minds of unprepared counsel as to lead them in many cases in making commitments or settlements that are unjust to their clients. I do not know why, but many lawyers believe that their most effective work is actual trial work in the court room; but it is becoming more and more evident that the most effective work a lawyer can do for his client is to prepare his case thoroughly and then present his case to his opponents in pre-trial hearings or conferences for the purpose of disposing of it without the necessity of an actual, expensive and lengthy court trial. In the coming years, the success of a lawyer may well be in what he accomplishes for his clients without trial than what he accomplishes for his client in trying cases in the court rooms. But do not think for a moment that such practice will destroy the art of advocacy in a court room. Conflicts between parties will continue in the hard core cases to keep the court sessions busy as the experiences of the last two years have demonstrated.

When I was practicing law, I thought that a delay in a jury case of about 18 months was about just right. Many other trial lawyers considered two years was the proper norm. But our thinking in Massachusetts was and still is completely out of line with that of other jurisdictions. Judicial administrators in many other jurisdictions consider the delay periods in Massachusetts are outrageous. At a recent conference on court administration attended by many judges and experienced trial lawyers, it was resolved that a delay in the final disposition of the average civil case beyond six months after the action is commenced should be considered excessive. Another conference set a similar limit of six months for tort cases and two months for commerical cases. We find that one can now obtain a jury trail in Buffalo, N. Y., in one month; in Cincinnati, two months; Oklahoma City, two months; Indianapolis, two months; and anywhere in New Jersey in six months. In Northampton, Greenfield

and other shire towns of the smaller counties, a jury trial can be obtained from six to eight months—and this year, in several of the medium size counties, within a year.

Some of you might say that a goal of six months or less is impossible; that plaintiffs are sometimes still in hospitals for six months; that cases cannot be evaluated in such short periods. Of course, if plaintiffs are in hospitals or any other good reason appears that a case cannot be immediately tried, their cases will necessarily have to be continued; but there are far greater numbers of cases without such reasons for delay that can be tried within a short period after they are entered in court; and the parties want them tried quickly. Furthermore, the country-wide demand for quicker disposition of cases will become increasingly greater for the reasons I have given you.

For the high reputation of Massachusetts justice, we all must strain all the more to place and keep the administration of justice on a modern day basis. We have been doing so for the last several years in reducing the loads of cases that have been sleeping on the dockets of every county. The Supreme Judicial Court is leading the way in this program of more prompt disposition of cases. No longer do we see cases held for decision by that court for very lengthy periods as have occurred in the past. At summer recess last year, the Supreme Judicial Court had cleaned up its dockets to such an extent that there was not one undecided case at the end of the term. Success in the trial courts can only be gained by greater efforts by the members of the bar cooperating with the greater efforts that will be made by the courts, recently enlarged by provisions for additional judges, to aid in this cause for more prompt, more efficient and more modern judicial administration.

You, as attorneys, are charged with the dual responsibility of being faithful to your clients and faithful to the courts. You, as attorneys, are charged by your oaths not to maintain or defend what is wrong or false to your knowledge. You are charged with the responsibility to fight for your client to the utmost of your ability; and you are likewise charged by your oath not to present to the courts any false delays, any false evidence, nor "offer any corruptions, deceits, tricks, false statements, nor consent to any such" but to "truly maintain the rights" of your clients so that your clients' "rights will not fail through any fault, negligence or default" on your part.

That is your delicate dual responsibility. With the increased business that is bound to come into the courts, you will be called upon more often in the future to judge yourself and for yourself this "finely balanced" responsibility that you have undertaken for the administration of justice. But though there will be more difficulties for the practicing lawyer in the performance of these duties to his clients and to the courts resulting from these demands for modern law reforms, the bar of Massachusetts will not fail.

ATTORNEYS' LIENS IN MASSACHUSETTS

The Boston Bar Journal for May 1958 contained a discussion of the present lien law ending with a suggestion for further legislation. In the June issue of the "Journal" George K. Black of the Boston Bar, who was active in connection with the passage of the present law in 1945, gave the history of that act and stated his reasons for opposing the proposal for further legislation. As this is a very practical subject for the bench and bar, we reprint the following (with permission of the "Journal") followed by Mr. Black's discussion. Ed.

Looking Toward Remedial Legislation

(From the Boston Bar Journal, May, 1958)

A survey of the statutes of our sister (New England) states, reveals a Rhode Island statute[33] which seems to go further in its applicable language than any other comparative legislation.

The language of the statute is so specific that any synopsis would be an injustice. Section 9-3-1.

"Whenever the relation of attorney and client has been entered into by an implied or express contract for service, wherein the attorney does not agree to be responsible for costs of suit, the attorney shall have a lien to the value of his contractual interests in the cause of action, claim, demand, counterclaim or other matter concerning which the contract is entered into."

Section 9-3-2. From the time notice is given by an attorney of the said relationship of attorney and client to the person or party against whom the claim . . . is made, or a cause of action or other matter is pending, the attorney's . . . agreement shall begin to operate as a lien, and no settlement either before or after judgment shall invalidate it, but the same may be enforced against money or thing of value which is the consideration for the settlement, or the parties, if they have made a settlement, may be proceeded against jointly or severally in an action on the case at law and shall be jointly or severally liable to the attorney for the full value of his lien. . . ."

Section 9-3-3. Any lien created by the provision of sections 9-3-1 and 9-3-2, may, at the election of the attorney, be established, foreclosed and enforced by a bill in equity, which bill may be tried and determined according to the usages in chancery and the principles of equity.

The specificity of the Rhode Island statute seems not only to afford the practicing attorney greater protection but seems also to present a carefully forged tool by which the Rhode Island court can solve the existing problems without any serious question as to the time of creation of the lien, its effect, and its method of enforcement. There is no question that if the Massachusetts Legislature would frame a statute in the same terms that the practicing bar

would be adequately protected and well aware of their rights in respect to liens on judgments and causes of action. The present Massachusetts statute, with its rather indefinite terminology, is undoubtedly inadequate by comparison.

However, both Massachusetts and Rhode Island, as well as the other New England states, have failed in their legislation, to deal with the problem of attorney's liens on papers.[34] Inasmuch as the Massachusetts court has never been squarely faced with the question and, therefore, never decided whether or not the attorneys' common law lien is law in this jurisdiction, it would seem advisable for the Massachusetts General Court to enact an appropriate statute.

By way of conclusion this author suggests the following bill:

Whenever the relationship of attorney and client has been entered into, the attorney shall have a valid lien on all papers in his possession, whether they represent his work-product, judicial papers to be filed in a court, papers given to him by his client for examination or other purposes or any other papers in his possession, for reasonable compensation commensurate with the value of the services performed by the attorney. This statute shall give the attorney the right to withhold any or all of the aforementioned papers for the reasonable value of his services, which may, upon application of the attorney or client, be determined by the Superior Courts of this Commonwealth.

This lien shall not be subverted by the summoning in of the attorney with his papers to any court, judicial, administrative or legislative proceeding by use of a subpoena duces tecum nor shall these papers be a proper subject for a bill of discovery.

It shall be deemed that there is an attorney-client relationship in existence from the time the attorney informs the client, expressly or impliedly, to that effect.[35]

Attorneys' Liens in Massachusetts

By

GEORGE K. BLACK

(From the Boston Bar Journal for June, 1958)

In view of the article in the May issue of the BOSTON BAR JOURNAL on attorneys' liens in Massachusetts by Messrs. Aronson, Nottonson, and Wekstein, and their recommendations for further legislative amendment thereof,[1] the history of our present statute and the

[33] G. L. of Rhode Island, §§9-3-1 through 9-3-3, inclusive.

[34] For an excellent discussion of the attorney's common law lien on paper and how it differs from a statutory lien on judgments, see Everett, Clarke and Benedict v. Alpha Portland Cement Co., 255 Fed. 931 (1915 and cases cited therein).

[35] As a result of the analyses contained herein, this author feels that the suggested statute may serve as a guide to remedial legislation.

[1] Attorneys' Liens in Massachusetts, by M. L. Aronson, I. N. Nottonson, and W. D. Wekstein, 2 BOSTON BAR JOURNAL, No. 5 (May, 1958), 7.

aims of that statute are presented to the Bar for their consideration.

The authors of the May article speak of the Rhode Island statute on attorneys' liens as an improvement on our statute.[2] Under the Rhode Island statute, the statutory or "charging lien" of an attorney in Rhode Island attaches from the time notice is given by an attorney of his relationship of attorney with his client to the person or party against whom the claim is made. The attorney's agreement then begins to operate as a lien.[3]

This may, or may not be a desirable improvement, but the Rhode Island version was considered and rejected in drafting the 1945 amendment. Here are the facts.

The 1945 amendment to Massachusetts G. L., c. 221, section 50, was a direct result of research done in litigation in Rhode Island involving an alleged Rhode Island attorney's lien, wherein this author was senior trial counsel. That research showed loopholes in our Massachusetts statute. An analysis both as to the statutory "charging lien" of an attorney of record in litigation, and the possessory lien, as it then existed in Massachusetts, was attempted in an article which was published in Boston University Law Review for November, 1944.[4]

That article pointed out the inadequacy of the protection of the statutory attorney's lien in Massachusetts. G. L. c. 221, section 50, as it then read, provided:

> "An attorney who is lawfully possessed of an execution or who has prosecuted a suit to final judgment in favor of his client, shall have a *lien* thereon for the amount of *his fees and disbursements in the cause* . . . etc."[5]

As we now read that statute, it looks all right. The attorney had a lien for his fees and disbursements. The difficulty lay in the decisions. The court had construed "fees" to mean the statutory attorney's fee taxed in costs against a losing party, and similarly that "disbursements" meant witness fees, term fees, and similar "disbursements" taxed as costs in a judgment against a defeated litigant. In other words, the Massachusetts statutory attorney's lien was only for taxed costs, to wit: entry fee, an attorney's fee of $2.50, term fees, and witness fees.[6]

Immediately on publication of the article, this author received telephone calls suggesting that he draft remedial legislation. The first telephone call came from the late Arthur W. Blakemore, Esq., who had written on many subjects; then from the late Romney Spring, Esq., and then Edward Dangel, Esq. This represented a

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[2] 2 Boston Bar Journal, No. 5, 7, 14.
[3] G. L. of R. I., sec. 9-3-2, as quoted 2 Bar Journal No. 5, 7, at 14.
[4] "Attorneys' Liens in Massachusetts," by George K. Black, 44 B.U.R. 224 (November, 1944).
[5] G. L. c. 221, sec. 50 (prior to 1945).
[6] *Ocean Insurance Co.* v. *Rider*, 39 Mass. 210 (1839); taxed costs are in G. L. c. 261, sec. 23; see: footnote 94 in 44 B.U.R. 224, 245 for history of term fee as affecting this subject.

cross segment of responsible opinion which could not be ignored. The November issue of the Review appeared in December and only one day remained before the deadline for filing petitions to the incoming 1945 Legislature. The article suggested two possible modes of amendment. However, older and wiser heads, advised us that the proposed amendments may have a stormy course; that efforts to effect an amendment had been defeated over a period of twenty years by the Legislature. We believed our position sound, and did not feel that such defeats were a true reflection of the political temper of Massachusetts. But the warning stuck. Correction was sought to be effected by the insertion of a single word, to which no one could object. That word was "reasonable." Who would object to the word reasonable? And was not a reasonable attorney's fee more acceptable to the Legislature than an attorney's fee without qualification? It implied potential judicial review.

That is the essence of the amendment. ". . . the attorney . . . shall have a lien for his *reasonable* fees and expenses."[7]

The single word "reasonable" sought to reverse the rule of *Ocean Insurance Co.* v. *Rider*, in 1839.[8]

No longer were taxed costs to be the quantum of the statutory lien of an attorney in Massachusetts.[9]

What is meant by a reasonable fee? We have pointed out the use of the word reasonable to change the rule of *Ocean Insurance Co.* v. *Rider*.[10] Has reasonable any further significance? It has. In Rhode Island, and if my memory serves me correctly, in New York and in Illinois, the statutory attorney's lien is for the amount provided in the contract between the attorney and his client. This might seem the better rule. But do not jump so fast.

At first blush, it would seem that all attorneys would be in favor of something which protects them, and that they would be of unified opinion on the subject of attorneys' liens. Such an assumption ignores the nature of the Bar. It ignores that the leveling and equalizing fact that the Bar through its individual members represents and reflects every view in the community. The views of the individual lawyer generally reflect the position of his clients and the position he must prosecute or defend in the courtroom. Thus, while an attorney's lien will help one attorney, there is another who will wish it was not there. No one of us doing a general practice can predict which side we will be on—so let the rule we favor be fair.

The New York rule which makes the contract between client and lawyer the quantum of the lien has caused many problems particularly as to contingent fees, and contracts for a percentage of

[7] G. L. c. 221, sec. 50, as amended by 1945, 397, sec. 1.
[8] *Ocean Insurance Co.* v. *Rider*, 22 Pick. 210 (1839); *Thayer* v. *Daniels*, 113 Mass. 129, 132-33 (1873).
[9] *In re Hoy's Claim*, 93 Fed. Supp. 264 (1950); *Murphy* v. *The Brilliant Company*, 323 Mass. 526, 532 (1948).
[10] *Ocean Insurance Co.* v. *Rider*, 22 Pick. 210 (1839).

the recovery. We believed that a court which has to find what is a reasonable fee will consider all the factors as it did in the Hoy case.[11]

Prior to the 1945 amendment the attorney who brought an action for a client was not protected against a settlement behind his back, even to the extent of his disbursements, before judgment. The 1945 amendment changed the time when the statutory lien attached. Under the present law the statutory lien for reasonable fees and expenses exists "From the *authorized* commencement of an action . . . or other proceeding."[12] The word "authorized" was inserted to meet an objection by Frederick Doyle, Esq. that such a lien should not exist in favor of an attorney who brought an action without instructions from, or employment by, a client. We considered it unnecessary, but it garnered more support and so it is in the statute.

The phrase in G. L. c. 221, sec. 50:

> " . . . provided, that the provisions of this sentence shall not apply to any case where the method of the determination of attorneys' fee is otherwise expressly provided by statute,"

was also a compromise, I believe in Third Reading, to meet the opposition, who said that we should not interfere with the method already in use in workmen's compensation cases before the Industrial Accident Board. The practice there is to order the insurer to make payment directly to an attorney for his fees and disbursements as approved by the Board. The proponents had no objection, and so the phrase is in the statute.

The authors of the May article suggest that remedial legislation should be sought which would make the attorney's statutory lien attach even before court action or other formal proceedings. As pointed out in the 1944 law review article, there are working difficulties in such an act. I am sure that if it had been in our proposals of 1945, the bill would have met defeat. As it was, the bill was defeated in the Senate by a tie vote, and resurrected next morning on a motion to reconsider due to the overnight activity of the organized bar associations throughout the Commonwealth. It was quite a night.

But what is the objection to the Rhode Island statute? There the lien is in force by virtue of a letter. In the past year, I have heard of at least two sharp practices by insurance adjustors going behind the back of an attorney to make settlements. If they continue, the demand for such legislation will mount. But the Rhode Island statute can present problems, which are avoided by the Massachusetts statute which follows the majority rule and also the practice at common law that the lien attaches on the commencement of an action.

The authors of the May article assert that an attorney can create a right in the nature of a lien by an agreement between attorney and client.[13] That assertion ignores the case cited in their previous

[11] *In re Hoy's Claim*, 93 Fed. Supp. 264 (1950).
[12] G. L. c. 221, sec. 50, as amended by 1945, 397, sec. 1.
[13] 2 Bos. Bar Jour., No. 5, 7, 9, note 16.

footnote. In *Herbits* v. *Constitution Indemnity*, 297 Mass. 539 (1932), our Court said that an attorney

> " . . . may not, upon bringing of a suit for personal injuries to his client, protect himself for the amount of his fee by an assignment since such a right of action is not assignable before judgment."[14]

The 1945 amendment is not a complete recodification of the subject of the attorney's statutory lien. The 1945 amendment, changing the quantum of the attorney's lien and the time when it attaches, was meant to fit into the existing case law of Massachusetts.

In 1855 the Massachusetts court ruled that payment by a judgment debtor, having notice of an attorney's statutory lien, to the judgment creditor does not discharge the judgment to the extent of the attorney's lien, and that the attorney may sue on the judgment for the amount of his lien.[15]

In case of offset of executions in the hands of the sheriff, the officer must recognize the attorney's statutory lien.[16] When in Massachusetts a creditor seeks to reach and apply the interests of a debtor in a judgment, the interest the creditor acquires by equitable attachment is subject to the statutory lien of the debtor's attorney.[17] After insolvency proceedings had started against a Massachusetts judgment creditor, it was ruled in 1900 that an attorney having a statutory lien on the judgment could collect the amount of his lien from the judgment debtor, but that he could not settle the entire judgment on the theory that his lien attached to the entire judgment.[18]

The court has said that the attorney's lien "is upon the whole sum recovered."[19] This does not mean that the attorney is entitled to the entire proceeds against his client's wishes. It does mean that if the attorney has received a payment from the judgment debtor which exceeds the amount of the statutory lien, he need not apply the amount so received in discharge of his lien, but may forward the amount received to his client; he still has a lien upon the balance due from the judgment debtor.[20]

From the above cited decisions it can be seen how the 1945 amendment fitted into the rules of the prior case law in Massachusetts.

There remain a few comments on procedure. The statute provides:

> "Upon request of the client or of the attorney, the court in which the proceeding is pending or, if the proceeding is not pending in a court, the superior court may determine and enforce the lien."[21]
>
> "The Court shall determine all claims in a summary manner, but without abridging the right of trial by jury as guaranteed by the constitution."[22]

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[14] See: *Check* v. *Kaplan*, 280 Mass. 170, 173 (1902).
[15] *Woods* v. *Verry*, 1855, 7—Mass. 357, 358.
[16] *Baker* v. *Cook*, 11 Mass. 236, 238 (1814); *Dnuklee* v. *Locke*, 13 Mass. 525, 527 (1816).
[17] *Thayer* v. *Daniels*, 113 Mass. 129 (1873).
[18] *Bruce* v. *Anderson*, 176 Mass. 161 (1900).
[19] *Bruce* v. *Anderson*, 176 Mass. 161, 163 (1900).
[20] *Baker* v. *Cook*, 11 Mass. 236, 238 (1814).
[21] G. L. c. 221, sec. 50, amended by 1945, 397, sec. 1.
[22] G. L. c. 221, sec. 50B, inserted by 1945, 397, sec. 1.

It was contemplated that the procedure to fix an attorney's lien be in the pending action or suit; that the justice of the court where the action or suit is pending is in the best position to fix the value of the services rendered. The provision as to the jury trial was a compromise in the Committee on Third Reading of the Legislature. The opponents were raising a hullabaloo that the act was unconstitutional. We did not agree, but the argument was overcome by the compromise. It can be seriously contended that a jury trial is not guaranteed on this issue by our constitution. And even if it is, I have not yet seen it claimed.

Section 50A requires notice to the treasurer of the Commonwealth or to the treasurer of any "political subdivision thereof" in order to assert an attorney's statutory lien against the Commonwealth or a political subdivision thereof.[23]

This too was a compromise to overcome the opposition of Corporation Counsel of the City of Boston. In no other case is notice necessary. The court action is considered notice to a defendant that a lien exists in favor of the attorney of record.

The above discussion indicates the procedure when a defendant settles a pending case directly with a plaintiff.

Another situation is where the plaintiff discharges his attorney of record. If the plaintiff takes the initiative, it should be done by a motion to substitute attorneys.[24] Such a motion automatically brings into issue, the amount of the lien of the first attorney, which when settled by the court awaits the outcome of the action and attaches to the judgment or any settlement.

In the alternative, the first discharged attorney may take the initiative and request the court to establish his lien and the amount thereof. Since the hearing thereon is a proceeding adverse to his client, some notice should go to the requesting attorney's client, so that the client may obtain counsel to represent him at the hearing unless his new counsel will appear for that purpose.

In no event should the discharged attorney voluntarily withdraw his appearance. The voluntary withdrawal by an attorney from pending litigation is a waiver of his liens, unless he is protected by a court order.[25]

I disagree with the May article in its doubt as to the existence of an attorney's possessory lien in Massachusetts. The cases are analyzed and a different conclusion reached in my 1944 article.[26] Recognition of the possessory lien of an attorney by the Massachusetts Legislature is enough for me. I do not believe legislation is necessary to create what already exists, or to clarify the recognition.

This author disagrees with the analyses and with the legislation proposed in the May article. The proposed amendment would cover in one statute both the possessory and what is now the statutory

[23] G. L. c. 221, sec. 50A, 1945, c. 397, sec. 1.
[24] See: *The Flush*, (1921) 277 Fed. 25, 31.
[25] *White* v. *Harlow*, (1855), 71 Mass. 463 (1855).
[26] Attorneys' Liens in Massachusetts, 42 B.U.R. 224, 228-234.

lien. In so doing it would make the possessory lien a special lien, and abolish what it now is—a lien for the general balance due to an attorney.

As I reread the Rhode Island statute, there occurs the possibility that the Massachusetts present law might give more protection. Quaere: as to a fraudulent settlement between defendant and plaintiff with the purpose of defrauding plaintiff's attorney? Is the Rhode Island statute confined to the consideration? An open question.

Also the Massachusetts procedure is simpler as to enforcement. It does not require a separate equity proceeding, where the proceeding already is in court.

Again, the attorney's possessory lien, proposed in the "May" article, is narrower than the present attorney's possessory lien extant in Massachusetts. It is suggested that the possessory lien now here in force is for the balance due on the open account with the attorney, and may cover money advanced, if such is the fact. It is not confined to the value of services rendered, as suggested in the proposed amendment. G. K. B.

THE PRESENT INCONVENIENT FORM OF AMENDING STATUTES

By

GUY NEWHALL

Formerly the practice, when amending a statute, was to enact the specific amendment and then print the new statute in full as amended. That, in my opinion, is the proper way to write legislation. Then a lawyer looking at the new statute knows exactly what changes were made in the old law. The present method used is simply to provide that, for example, Chapter 201 of the General Laws shall be amended by striking out Section 6 and inserting in its place the following new Section 6. This means that a person examining the amendment must compare the old and the new law word for word and try to work out just what changes the new law made. As an illustration, recently I was digesting Chapter 283 of the 1958 statutes. I had to work hard to find out just what changes were made. In cases where only one or two words of a statute are changed, it is perfectly simple to amend the statute in a clearer manner. In such cases, if the section amended is a long one, repeating the whole section seems unnecessary. The sentence or paragraph amended can be specified with the insertion or omission in the amendment indicated.

FOR NEWHALL'S DISCUSSION OF JOINT ACCOUNTS IN SAVINGS BANKS SEE P. 59.

ESTATE SETTLING UNDER A GENERAL TESTAMENTARY POWER OF APPOINTMENT

By RAYMOND R. CROSS, *of the Northampton Bar*

With the enactment of the Revenue Act of 1948 the Marital Deduction concept became an integral part of our federal estate tax structure. Several articles in honor of this tenth anniversary year have been written reviewing the developments and problems connected with the concept. See: "A Decade With the Marital Deduction", 97 Trust and Estates, No. 4, page 304. These articles have concerned themselves with federal estate tax matters. However, as time goes on and the surviving spouse ceases to survive, there is a subtle point, concerning trust and probate law, with which the Massachusetts attorney should be acquainted.

Take this typical Massachusetts case: Husband by will had created a marital deduction trust for wife. Wife, of course, has the income for life and a general testamentary power of appointment. Wife dies, but has validly exercised the power in favor of certain appointees. The question for the trustee of the marital deduction trust is this: Should he transfer the corpus to the appointees or to the executor of the donee-wife's will?

In the normal course of trust administration it is the duty of the trustee, when the trust terminates, to convey the trust property to the persons beneficially entitled to it. 3 Scott On Trusts, 2 ed., Section 345.

Does the fact that the corpus of the trust is subject to a general testamentary power of appointment change the normal course of trust administration at termination?

In a sense it does, but only if the estate of the donee-wife is insolvent.

It is elementary that in Massachusetts the donee of a testimentary power has no title in the property subject to the power. The donee simply has the privilege, if she chooses to exercise it, of disposing by will of the property of the donor. She is the deputy of the donor in disposing of his property. *Hill* v. *Treasurer & Receiver General,* 229 Mass. 474, 476. See also *Crawford* v. *Langmaid,* 171 Mass. 309 at 311.

However, if the donee exercises the power, this "sets in motion another and different force quite outside itself", *Hill* v. *Treasurer & Receiver General,* supra, page 477, namely the equitable doctrine that the appointed property is regarded for certain purposes as assets of the estate of the donee. To state the rule in another way: "When a power of appointment is general, the weight of authority is that creditors of the donee may reach the appointed property if an appointment has been made by will to a volunteer." Simes and Smith, The Law of Future Interests, 2 ed., Section 945, page 399. Some American cases have held that, if there is a power to appoint

by will only, the appointed property cannot be assets. *Humphrey* v. *Campbell*, 37 S.E. 26 (South Carolina); *Adger* v. *Kirk*, 108 S.E. 97 (South Carolina). But the Massachusetts and the majority rule is that creditors can reach the appointed property even though the power is testamentary only. *State Street Trust Co.* v. *Kissel*, 302 Mass. 328.

This doctrine, that the appointed property may be reached by the donee's creditors where a general power has been exercised by will, is also applied where administration expenses are involved. "Thus, the appointed property may be reached to the same extent for costs of administration of the donee's estate, and under the same circumstances, as for the claims of his creditors." Simes and Smith, supra, page 408; see also *Tuell* v. *Hurley*, 206 Mass. 65 (in this case the court assumes that if the donee had been insolvent so that his creditors could reach the appointed property it would also have been available for administration expenses).

When a general power is exercised by the will of an insolvent donee, thus giving the creditors the right to proceed to reach the appointed property, what should the trustee do?

In discussing this question Simes and Smith, supra, point out that the property to be reached is not, strictly speaking, assets of the estate of the donee. And, of course, the language in *Hill* v. *Treasurer & Receiver General*, supra, bears out this conclusion. (See page 476.) However, the property is, as a rule, handed over to the executor of the donee, but that is purely for convenience. Simes and Smith, supra, page 407; see also *Lovejoy* v. *Bucknam*, 299 Mass. 447, 454; *Hill* v. *Treasurer & Receiver General*, 229 Mass. 474, 477. Also it should be pointed out that all of the donee's own property is taken first to satisfy the creditors before the right to the appointed property arises. *Tuell* v. *Hurley*, 206 Mass. 65.

In short, the appointed property is not automatically turned over to the executor of the donee; if it is turned over it is done "merely as [a] matter of convenience of administration and not of strict legal right." *Hill* v. *Treasurer & Receiver General*, supra, page 477; *Lovejoy* v. *Bucknam*, supra, page 454; 3 Restatement, Property, Section 329, h., page 1865.

The Restatement of the Law of Property, in light of the foregoing discussion, seems to adequately set forth the principles to guide the trustee, and the executor of the donee, in the situation where the donee's property is insufficient to pay her debts and administration expenses.

> "*h. Procedure for administration of appointed property held intrust.* Where, under a general power, an appointment is made of property held in trust it is a question of convenience in each particular case whether the property should be distributed by the trustee or by the personal representative of the donee. Ordinarily, where debts and administration expense do or may exceed the donee's owned property, the interests of simplicity will be served by allowing the personal representative

of the donee to administer appointed assets as well as owned assets; and therefore, ordinarily, in such cases the trustee should deliver all appointed assets to the personal representative, who then has the duty, after exhausting other available property, to use so much of the appointed assets as may be necessary to pay debts and administration expense and to distribute the balance to the appointees. But in situations where administration by the personal representative will not be convenient and economical (for example, where the trustee and personal representative reside in different states) the appointed assets should be administered by the trustee. If the personal representative and the trustee do not agree on the matter of convenience the issue can be determined upon a bill for instructions by the trustee or an action brought by the representative against the trustee to obtain delivery. Where there is no possibility that the appointed property will be required to pay debts or administration expense, the property should be distributed by the trustee, there being no justification for the additional expense involved in the participation of the personal representative in the process of distribution." See 3 Restatement, Property, supra.

In conclusion, it is fair to say that the Marital Deduction concept in its first ten years has generated much new thinking and ingenuity in the field of estate planning. The next ten years may well see new, or at least unusual, developments in the field of estate settling.

LEGAL COMPLICATIONS RESULTING FROM INADEQUATE LIABILITY INSURANCE

By

FRANKLIN T. HAMMOND, JR. OF THE BOSTON BAR

As a practical matter, it is unsatisfactory for an automobile owner, one in control of real estate, or other person exposed to tort liability, to be confronted with a large tort claim in excess of the policy limits of liability insurance carried. To the practical disadvantages may be added a number of procedural uncertainties and legal complications.

Suppose, for example, that A, in his Buick sedan, proceeds along a "throughway," A says at a speed of 35 miles per hour. At the intersection of S Street, C, in a Ford roadster, accompanied by two friends, emerges from S Street on A's left, as A says, without stopping, in spite of a "stop sign," and collides with A. C suffers injuries which incapacitate him for a year, causing loss of wages of $3,500. C's property damage, hospital and medical bills are

$1,200. C, one year later, sues A for $50,000, claiming damages as indicated, together with damages for pain and suffering and permanent injury. C claims a jury trial. A has a liability policy issued by T with a policy limit of $15,000. The policy includes the following:

"The Company shall defend in his name and behalf any suit against the insured alleging such injury or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the Company shall have the right to make such investigation, negotiation and settlement of any claim or suit as may be deemed expedient by the Company. . . ."

"The insured shall cooperate with the Company and, upon the Company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits; and the Company shall reimburse the insured for expenses, other than loss of earnings, incurred at the Company's request. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident."

Answers by C to interrogatories indicate that C will testify that he arrived at the intersection, stopped, looked both ways, saw nothing coming for at least 100 yards, entered the intersection slowly, and when halfway across was struck violently by A's car. The evidence of C's friends presumably will be the same. C's counsel offers to settle for $12,000. This is rejected by T, who makes a counter offer to settle for $3,000. This is rejected by C.

At this point it may be useful to evaluate C's claim for purposes of settlement. The divergent stories of A and C indicate that there is at least a 50-50 hazard of liability. If liability is found, the probable damage is perhaps $12,000. However, the claim for permanent injury may involve an additional $20,000. The hazard of such an additional award may be 1 in 4. Hence the claim for $12,000 may be worth $6,000 and the additional claim worth $5,000, or a total of $11,000. There is, however, a policy limit of $15,000. From T's point of view, its liability may be worth $6,000 plus $750, or $6,750. The possible excess liability ($32,000 over $15,000 = $17,000) may be worth $4,250. Taken together, these add up to the value of the claim as a whole, $11,000.

T, however, may be unwilling to settle. T has in Massachusetts no duty to settle, but only the right to settle. *Abrams* v. *Factory Mutual Liability Insurance Company*, 298 Mass. 141 (1941).

". . . Where there is a conflict of interest between the insurer and insured, the insurer may exercise the right to defend for its own advantage, even though from the standpoint of the insured a different course would have been preferable. Thus the insurer may prosecute exceptions, although risk to the insured may be in-

volved. *Davison* v. *Maryland Casualty Company*, 197 Mass. 167, 171. Or it may consent to a judgment, although a subsequent action by the insured may be prejudiced. *Long* v. *Union Indemnity Company*, 277 Mass. 428. (See now, however, G. L. (Ter. Ed.) C. 231, § 140A, as inserted by St. 1932, C. 130.) In short, the insured has transferred to the insurer his right to defend himself as security for the risk undertaken. But the insured still has an interest in his own defense which may be financially greater than the interest of the insurer, if the claim is likely to result in a large judgment, and if the limit of the insurer's liability is low. In general, a security holder may use the security to the extent necessary for his own protection, but he must not negligently sacrifice the rights of others. . . ."

"There is no promise to settle or to attempt to settle comparable to the promise to defend where there is no settlement. Defense is part of the protection of the policy. Settlement is optional with the insurer. *Although the insured may be prejudiced by the insurer's refusal to accept an advantageous offer, yet we think that the policy entrusts the matter of settlement to the judgment of the insurer, and that its judgment, exercised in good faith, is final.* (Italics added.) The practical difficulties of any other construction are strongly stated in *Best Building Company, Inc.* v. *Employers, etc., Corporation*, 247 New York, 451. See also *Long* v. *Union Indemnity Company*. . . . We need not decide that there can never be actionable negligence of any kind in connection with the handling of settlements, but something more must be shown than failing to make a settlement which a reasonably prudent person exercising due care 'from the standpoint of the assured' would have made. . . ."

In the *Long* case the court, quoting from the *Davison* case, said that the insurer *"is not bound to consult the interest of the insured to the prejudice of its own interests in case of a conflict between the two."* (Italics added.)

For a full discussion of the "duty" of an insurer to settle, see Keeton, "Liability Insurance and Responsibility for Settlement," 67 Harvard Law Review 1136 (1954). Various standards of duty have been suggested in various jurisdictions; the Company must give "equal consideration" to insured's interests; or "paramount consideration"; or must sacrifice its interest in favor of those of the insured. The individual case usually involves allegations of negligence in investigation, preparation or trial, as well as failure to settle. *Op. cit.* pp. 1137-1148.

Returning to our hypothetical case with the *Abrams* case in mind, if T in good faith prefers to go to trial rather than settle, that is T's privilege. If C gets a verdict for $32,000, however, the company will pay $15,000 and A will suffer a loss of $17,000.

Looking forward to this dismal possibility, A may:

(1) offer to contribute to a settlement below the policy limit; or

(2) negotiate to settle the excess liability above the policy limit.

As to (1), since A's hazard may be worth $4,250, he may advise T that he will contribute $4,250 if T will contribute $6,750, in order to offer C $11,000 for the claim as a whole. If this is done and C accepts, A has escaped the risk of the $17,000 excess, but has acquiesced in arrangements by which T pays only $6,750, although it undertook to indemnify A for damages up to $15,000, and A has found it necessary to pay $4,250.

If T declines to contribute $6,750, it appears possible that T is not acting in good faith in deciding not to offer to settle. This, however, assumes that the settlement value of the claim is susceptible of definite determination, which may be far from the fact. The *Abrams* case nevertheless suggests that if T is unwilling to offer the *minimum* that a reasonable prudent lawyer would advise the insurer to pay, T may be liable to A if A thereafter suffers a verdict for an excess. Thus, if T's offer of $3,000 is unreasonably low, which it appears to be, and if no further offer is made by T, the company may incur liability for failure to use its judgment in good faith.

As to alternative (2), A may negotiate with C to settle the excess above $15,000. "Even before any breach by company, insured may also make at his own expense a settlement of the excess claim only. . . ." *Op. cit.* 67 Harvard Law Review, 1136, 1154. See *General Accident, Fire and Liability Assurance Corporation* v. *Louisville Home Telephone Company*, 175 Ky. 96 (1917). Note, 142 ALR 809 (1943). C, however, if he settles the excess, will have nothing left but a 50-50 chance of collecting $12,000 from T, value $6,000—plus one quarter of $3,000—$750 or a total of $6,750. Accordingly, he will not presumably settle the excess for less than $4,250. If A pays $4,250 to settle the excess, he may find this hard to reconcile with the fact that T may later settle for $6,750 or may escape liability altogether on trial. In other words, if the settlement value of the claim as a whole is $11,000 and the policy limit is $15,000, A may feel that it is unreasonable that he should be in a tactical position in which he must pay $4,250 when the value of the claim as a whole—$11,000—is well below the policy limit. In jurisdictions where the insurer is required to give equal or greater consideration to the interests of the insured, it would seem unreasonable for A to have to pay anything to settle the excess. In Massachusetts, however, where the insurer may elect not to settle, even though this conflicts with the interest of the insured, and will be protected if its judgment is exercised in good faith, A is not in a position to bring about a settlement of the claim as a whole even though the settlement value is below the policy limit. In effect there are two separable claims, one for the policy limit and one for the excess, and the value of each must be determined separately. The insurer must pay the full amount of the policy limit only after judgment, or when liability is incontrovertible and damages clearly equal or exceed the policy limit. The insurer may refrain from settling wherever there is reasonable doubt as to liability, or reasonable doubt as to whether the damages

equal the policy limit. These leave the insured in the position where the excess liability must be valued separately without regard to the value of the claim as a whole.

Thus there are compelling reasons for persons exposed to tort liability to carry liability insurance with limits equal to the maximum hazards involved.

MASSACHUSETTS CONTRACT CASES AND PROBLEMS IN THE CHOICE OF LAW

WITH COMMENTS ON THE "RESTATEMENT"

By EDITH W. FINE *of the Massachusetts Bar*

The sections of the Restatement of the Conflict of Laws dealing with contracts have been criticized and are being revised. The relevant decisions are conflicting and confused. The purpose of this paper is to examine the Massachusetts decisions[1] to see what rules can be abstracted from the cases to guide parties involved in multi-state transactions where the forum state for disputes is likely to be Massachusetts, and to see what possible changes may suggest themselves.

The Restatement[2] takes the view that the place of contracting,—that is, where the last act necessary to complete a binding contract takes place,—governs the validity and effect of the contract. However, questions relating to performance are governed by the law of the place of performance.[3] Twenty sections[4] are devoted to rules for the forum state to use to determine in various situations where the last act in fact occurred.

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[1] For analyses of decisions in other states, see Bernhard, A Rationalization of the Illinois Conflict of Laws and Rules Applicable to Contracts, 40 Ill. L. R. 165; Stewart Conflict of Laws: Contractual Liability in Oklahoma, 9 Okla. L. R. 395; Cormack, California Conflict of Laws in Regard to Contracts, 12 Southern Calif. L. R. 335; Cormack, Conflict of Laws in Regard to Contracts in Field Code States other than California, 12 Southern Calif. L. R. 362 (Mont., N. D. and S. D.); Note, Conflicts of Laws—What Law Governs the Validity of a Contract in Virginia, 26 Va. L. R. 969; Stumberg, Conflict of Laws—Validity of Contracts: Texas Cases, 10 Tex. L. R. 163; McClintock, The Conflict of Laws as to Contracts; the Restatement and Minnesota Decisions Compared, 13 Minn. L. R. 538; Crawley, Conflict of Laws in Mississippi as to Contracts, 14 Miss. L. J. 240; Note, Conflict of Laws—Contracts, 17 Nebr. L. Bull. 361; Greene, The New York Rule as to the Law Governing the Validity of Contracts, 12 Cornell L. Q. 286; Allen, Conflict of Laws—What Law Governs the Validity of a Contract in Kentucky, 28 Ky. L. J. 70. Donnelly, Contracts in the Conflict of Laws: Kansas Decisions, 6 J. Bar Ass'n. Kans. 140; Harrison, Validity—What Law Governs the Validity of a Contract—The Alabama Decisions, 7 Ala. L. R. 182.

[2] A.L.I. Restatement, Conflict of Laws, § 332. "The law of the place of contracting determines the validity and effect of a promise with respect to:

(a) capacity to make a contract;
(b) the necessary form, if any, in which the promise must be made;
(c) the mutual assent or consideration, if any, required to make a promise binding;
(d) any other requirements for making a promise binding;
(e) fraud, illegality, or any other circumstances which make a promise void or voidable;
(f) except as stated in § 358, the nature and extent of the duty for the performance of which a party becomes bound;
(g) the time when and the place where the promise is by its terms to be performed;
(h) the absolute or conditional character of the promise.

[3] See A.L.I. Restatement, Conflict of Laws, § 358, quoted on pages 27 and 28.

[4] A.L.I. Restatement, Conflict of Laws, §§ 312-331.

Critics of the Restatement have asserted a need for more flexibility and a preference for a "center of gravity" or "grouping of contacts" theory. This would require a determination in each case of the state with the "most vital"[5] connection to the particular contract. It is said that a rule dependent exclusively upon either the fact of occurrence of the last act or performance is too often fortuitous and hence arbitrary and not likely to be closely in accord with the parties' probable expectations.

In spite of the existence of the Restatement for over twenty-four years and the strong desire for uniformity in result, courts have followed at least four different approaches in making the choice of law: (1) following the Restatement, looking to the law of the place of making; (2) looking to the law of the place of performance; (3) looking to the law of the place which the parties intended should govern, gleaned either from express stipulations in the agreement or the court's idea of what was probably intended, sometimes—most often in usury cases—with the view that the parties must have intended to invoke that law having a substantial connection with the contract which would uphold the arrangement;[6] and (4) the "proper law"—or "center of gravity" approach mentioned above. The place of making rule has been deemed by commentators to be law in Massachusetts[7] and the First Circuit in applying the Massachusetts conflicts rules under *Klaxon Co.* v. *Stentor Electric Mfg. Co.*[8] looks to the law of the place where the contract was made.[9] But a close examination of the cases shows that some authority exists for the application of both the law of the place of performance and the law intended by the parties to govern. Supporters of the "center of gravity" approach may point to certain Massachusetts decisions as showing that, although the court has spoken in terms of the place of making, performance, or intent, in fact it chose the law of the place with the most significant contacts. But this, it is submitted, is merely coincidental, and the relevant language cannot be regarded as establishing the "center of gravity" rule. Indeed, as will be seen, there are several situations in which the court found the validity or effect governed by the law of one state although quite clearly the most significant contacts were elsewhere. An analysis of the Massachusetts decisions will show that the court has not been entirely consistent in its conclusions.[10]

1. The intent theory in Massachusetts:

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[5] See Cook, "Contracts" and the Conflict of Laws: Intention of the Parties, 32 Ill. L. R. 899, 918.

[6] See Lorenzen, Validity & Effects of Contracts in Conflict of Laws, 30 Yale L. J. 565, 655; 31 Yale L. J. 53; Stumberg, Conflict of Laws, 224-279; Williston, Contracts, § 1792; Pollard, Conflict of Laws—Usurious Contracts, 4 Ark. L. R. 88; Note, Conflict of Laws and the Validity of Contracts, 20 Ia. L. R. 607.

[7] After an analysis of the cases, Professor Beale, 2 Conflict of Laws, 1144, concluded that "Massachusetts is pretty firmly committed to the doctrine that the validity of a contract is necessarily governed by the law of the place of making."

[8] 313 U. S. 487.

[9] See *Wetherell Bros. Co.* v. *United States Steel Co.*, 200 F2d 761, 763.

[10] No attempt has been made to include decisions involving rights arising out of negotiable instruments as the controlling considerations in those cases are believed to be quite different from the normal contract situation.

(a) Where the parties expressed their intent as to the applicable governing law, Massachusetts has looked to that law where it has borne a substantial relation to the contract. In *Mittenthal* v. *Mascagni*,[11] the parties entered into an agreement in Italy, the defendant to direct concerts and operas on tour in the U. S. and Canada. The court in determining the question of the validity of a provision in the agreement for settlement of disputes, looked to the law of Italy on the basis of an expression in the contract as follows: "The present contract, in its form and substance, is regulated by the Italian laws. . . ."[12]

For cases falling within the provisions of the Uniform Commercial Code,[13] the rule is as follows: "Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or of such other state or nation the parties may agree that the law of either of this state or of such other state or nation shall govern their rights and duties. . . ."[14]

The cases in which the court has refused to apply the chosen law are explainable on grounds other than a rejection of the right of parties generally to make their own choice of law. In *Dolan* v. *Mutual Reserve Fund Life Ass'n*[15] on the back of a life insurance policy was the provision that "this contract shall be governed and construed only according to the laws of the State of New York," the domicile of the insurance company. In determining the question of whether or not certain statements of the assured were to be regarded as warranties or mere representations, where under Massachusetts law they were the latter, the court said (p. 199): ". . . where parties are contracting in this Commonwealth in regard to a matter which, under their contract, plainly would be governed by the laws of this State enacted on grounds of public policy, it is at least doubtful whether they can be permitted to nullify those laws in their application to their contract by a stipulation that the contract shall be governed by the laws of another State." However, the basis for the rejection of New York law by the court was the application of a Massachusetts statute requiring that a description of the policy appear in bold letters on its face and it was held that the stipulation on the back of the policy was insufficient to change the character of the contract.

In determining the validity of a life insurance policy in another case, *Harwood* v. *Security Mutual Life Ins. Co.*[16] the court ignored

[11] 183 Mass. 19, 22.
[12] Some other dicta supports this result. See *Davis* v. *N. Y. Life Ins. C.*, 212 Mass. 310, 312, where in determining a question of construction the court said, "It is to be noted that neither the application nor the policy contains any provision respecting the law which is to govern . . ." See also *Popadapoulos* v. *Bright*, 264 Mass. 42, 46, where in construing a brokerage agreement the court pointed out that the contract contained no provision as to the governing law.
[13] G. L. (Ter. Ed.) c. 106, §§ 1-105.
[14] See Rheinstein, Conflict of Laws and the Uniform Commercial Code, 16 Law and Contemp. Problems, 114, 133-138; Goodrich, Conflicts Niceties and Commercial Necessities, 1952 Wis. L. R. 199.
[15] 173 Mass 197.
[16] 263 Mass 341, 348.

without a statement of its reasons for so doing a provision stating that the place of the contract was expressly agreed to be N. Y. In *Brockway* v. *Amer. Express Co.*[17] concerning a contract to transport horses in which the parties stipulated that New York law would govern, the court failed to give effect to the provision on the ground that it was part of a separate contract, and not the one on which plaintiff's action was founded. However, even if the provision indicated an intention that New York law govern the contract sued on, the court said that such intention should not be given effect. In *Commonwealth Mutual Fire Insurance Co.* v. *Knabe Co. Mfg. Co.*[18] where the question concerned the liability to a Massachusetts insurance company of a policyholder for assessments, there was a stipulation that Massachusetts law should govern. Nevertheless, rather than dispose of the case on the basis of the stipulation, the court went out of its way to find that Massachusetts was the place of making.

It should be noted that all the cases in which the chosen law was ignored or expressly rejected were in all probability contracts of "adhesion." That is, they are contracts the terms of which were unilaterally drafted in advance and insisted upon by one of the parties, rather than one whose terms were arrived at after bargaining from positions of relatively equality.[19] The insurance contracts are typical adhesion contracts, and it is not unusual to find Massachusetts applying its law to protect its domiciliaries against foreign insurance companies who have chosen the law of a place more favorable to it, although the company's attempt to choose the applicable law might conceivably be justified by a desire to compute the risk and therefore set their premiums intelligently.

(b) In the absence of an expression in the contract as to the parties' intent, the court has never squarely held controlling the law presumably intended to govern the contract on the basis of the fact of presumed intent alone. There are some cases indicating that if the parties intended some law other than that otherwise applicable to govern effect would be given to it.[20]

In *Penobscot & Kennebec R.R. Co.* v. *Bartlett*,[21] in deciding a question of interpretation of a contract made in Massachusetts for subscription to shares of stock in a Maine railroad, the court held Maine law applicable, saying of the contract "we must look at its nature and character, the purpose for which it was made and the objects intended to be accomplished by it. This is the only mode by which we can judge accurately of the *intent* of the parties,

[17] 171 Mass. 158.
[18] 171 Mass. 265.
[19] See Ehrenzweig—"Adhesion Contracts in the Conflict of Laws," 53 Colum. L. Rev. 1072.
[20] See *Bottomley* v. *Metropolitan Life Ins. Co.*, 170 Mass. 274, 277; *Brockway* v. *American Express Co.*, 171 Mass. 158, 161, where the question concerned the validity of the contract, and *Jewett* v. *Keystone Driller Co.*, 282 Mass. 469, 475, and *Weiner* v. *Pictorial Paper Pkg. Co.*, 303 Mass. 123, 131, where the question concerned the construction and nature of the obligation. See also *Baxter National Bank* v. *Talbot*, 154 Mass. 213, 216.
[21] 12 Gray, 244, 246-247.

and arrive at a correct conclusion on the question whether the contract was to be performed at the place where it was made, or in another place subject to a different jurisdiction, and where a different rule of interpretation may prevail." Although the court spoke broadly of intent it is clear that they based their decision on the fact of intended performance in Maine[22] rather than an intent as to the governing law. Similarly, in the case of *Natl. Surety Co.* v. *Nazzaro*[23] where the court had to determine the meaning of the words "bail bond" used in a contract of indemnity made in Massachusetts, it looked to the law of Connecticut where the contract was to be performed. The decision to do so, however, seems at least partly to be based upon the fact that, construed according to the law of Massachusetts, the desired end could not have been achieved, so that the parties must have intended the application of Connecticut law.

2. The place of performance theory in Massachusetts:

Although the law of the place of making is generally regarded as controlling at least the validity and construction of a contract, there is some reason to believe that where the place of making and of performance do not coincide, the law of the latter place might be applied. The court often in choosing the applicable law takes express note of the fact that the place of making and of performance are identical.[24] Furthermore, it has been stated that there is a "limitation on [the place of making rule which] . . . appears to arise when it is manifest that the contract was made with a purpose by the parties that it is to be performed in a particular place and is to be construed as to its validity and meaning . . . by the law of that other jurisdiction." See *Clark* v. *State Street Trust*,[25] where the court had to determine what was the correct construction of words used in a contract. The court's language, however, is somewhat weakened by the fact that the law of both the place of making and of performance were the same. A similar limitation on the place of making rule is stated in *Jewett* v. *Keystone Driller Co.*[26] where the question concerned the extent of the seller's obligation to give notice before foreclosing under a conditional sale agreement. How-

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[22] See similar language in *Old Dominion Copper Mining & Smelting Co.* v. *Bigelow*, 203 Mass. 159, 174, "Where a contract is made with a purpose by the parties that it shall be performed in a particular place, its validity and interpretation are to be determined by the law of the place where it is to be performed. It is made with a view to that law."

[23] 239 Mass. 341.

[24] Where the question concerned the validity of the contract: *Greenwood* v. *Curtis*, 6 Mass. 358, 380; *Commonwealth Mut. Fire Ins. Co.* v. *Fairbanks Canning Co.*, 173 Mass. 161, 164; *Stone* v. *Old Colony St. Ry.*, 212 Mass. 459, 462-3. Where the question concerned the nature of the obligation or construction of the language: *Conn. Mut. Fire Ins. Co.* v. *Wm. Knabe & Co. Manuf. Co.*, 171 Mass. 265, 270; *Crehan* v. *Megargel*, 235 Mass. 279, 282; *Montreal Cotton & Wool Waste Co. Ltd.* v. *Fidelity Deposit Co. of Md.*, 261 Mass. 385, 390; *Seeman* v. *Eneix*, 272 Mass. 189, 193. Where the question concerned the correct measure of damages: *Atwood* v. *Walker*, 179 Mass. 514, 518. Whether or not there was a breach or the contract was discharged: *Stebbins* v. *Leowolf*, 3 Cush. 137, 144; *May* v. *Breed*, 7 Cush. 15, 28; *Tarbox* v. *Childs*, 165 Mass. 408, 410; *Daniell* v. *Boston & Maine R.R.*, 184 Mass. 337, 338; and see *Hill* v. *Chase*, 143 Mass. 129, 130.

[25] 270 Mass. 140, 150.

[26] 282 Mass. 469, 476.

ever, in that case there was found to be no intent that the contract be performed in a particular place other than the place of making.[27]

Apart from *Penobscot & Kennebec Ry. Co.* v. *Bartlett,* mentioned above, there are two cases which might be regarded as authority for the application of the law of the place of performance to questions not strictly relating to performance. In *Bottomley* v. *Metropolitan Life Ins. Co.*[28] the question concerned the effect of false representations in an application for revival of a lapsed insurance policy on the life of a R. I. domiciliary, the application having been made and accepted in Massachusetts. The court held R. I. law applicable saying (at p. 277) "The place of performance will ordinarily be deemed to be the place of a contract, unless the parties intended otherwise." Again, however, the holding is somewhat weakened by the fact that the court regarded the parties' rights as arising out of the original insurance contract which was unquestionably governed by the law of Rhode Island. In the other case—*Old Dominion Copper Mining & Smelting Co.* v. *Bigelow,*[29]—an action was brought by a corporation against its promoter to recover a secret profit made in the sale of mining property to the corporation. Apparently regarding the question of liability as arising out of contract, the court found that although the contract was made in N. Y., it was intended to be performed in Massachusetts where the corporation's offices were to be located and therefore Massachusetts law governed the question of liability. Again, however, Massachusetts and New York law were found to be the same.

Following the Restatement distinction, special questions concerning performance of the contract have been held to be governed by the law of the place of performance although the line is difficult to draw between performance or breach on the one hand and the nature and construction of the contract on the other.[30] Where the question was whether or not a particular form of payment constituted satisfaction of the contract the law of the place of performance was held to govern. *Tarbox* v. *Childs.*[31] See *U. S. B. & M. Liquidation Corp.* v. *Hilton*[32] and *American Matting Co.* v. *Souther Brewing Co.*[33] The same result was reached where the question concerned the allowance of a grace period (*Cribbs* v. *Adams*[34]), and the correct measure of damages (*Meyer* v. *Estes*[35]). To determine whether or not performance of a contract will be illegal, quite naturally the court looks to the law of the place of performance. See *Commonwealth* v. *Griffiths;*[36] *Bride* v. *Clark;*[37] *Thurston* v.

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[27] See *Davis* v. *N. Y. Life Ins Co.*, 212 Mass. 310, 312, where the court indicated that a question of construction might be decided differently if a place of performance were indicated.

[28] 170 Mass. 274.

[29] 203 Mass. 159, 173-174.

[30] For a discussion of the distinction see *Carnegie* v. *Morrison,* 2 Met. 381, 397-398.

[31] 165 Mass. 408, 411.

[32] 307 Mass. 114, 117.

[33] 194 Mass. 89, 94.

[34] 13 Gray, 597, 599.

[35] 164 Mass. 457, 465. See and compare *Atwood* v. *Walker,* 179 Mass. 514, 519.

Percival;[38] *Orcutt* v. *Nelson*;[39] *Parsons* v. *Trask*.[40] However, it is not clear that the effect of the illegality on the parties' underlying rights on the contract are also governed by this law.

3. The place of making rule in Massachusetts:

If mere continuous reiteration of a principle were sufficient firmly to establish a rule, there would be no question about the thrust of Massachusetts authority in this field. There are numerous cases which state the place of making rule as to the formal or essential validity[41] as to the nature of the agreement or construction of terms and whether or not there has been a breach[42] and as to the effect of mistake or misrepresentation on the rights of the parties[43] but reasons: 1) all the significant contacts were located in one state; 2) the foreign law was not proved and the presumption of the similarity of common law was applied to invoke the law of the forum; 3) the law of all places with which the contract had significant contacts was identical on the point at issue; or 4) the question was held to be one concerning the remedy or a strong public policy of the forum, thereby making the law of the forum applicable as such.

On the other hand there are cases in which the statement of the principle has been necessary to the result.

In the field of insurance, for example, where significant contacts including substantial performance were elsewhere, the law of the place of making has been held to govern the validity and construction of the policy. In the recent case of *Pearsall* v. *John Hancock Mutual Life Ins. Co.*[44] the insured was domiciled in Rhode Island where

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[36] 204 Mass. 18, 22.
[37] 161 Mass. 130.
[38] 1 Pick. 415.
[39] 1 Gray 536.
[40] 7 Gray 473.
[41] *McIntyre* v. *Parks*, 3 Met. 207. *Basford* v. *Pearson*, 7 Allen 504. *Hazard* v. *Day*, 14 Allen, 487; *Milliken* v. *Pratt*, 125 Mass. 374; *Hill* v. *Chase*, 143 Mass. 129. *Fonseca* v. *Cunard Steamship Co.*, 153 Mass. 553. *Alliance Mut. Ins. Co.* v. *Sawyer*, 160 Mass. 413. *Claflin* v. *U. S. Credit System Co.*, 165 Mass. 501. *Brockway* v. *Amer. Expr. Co.*, 168 Mass. 257; *Conn. Mut. Fire Ins. Co.* v. *Fairbanks Canning Co.*, 173 Mass. 161; *Bearse* v. *McLean*, 199 Mass. 242. *Barker* v. *U. S. Fid. & Guar. Co.*, 228 Mass. 421; *Hopkins* v. *Flower*, 256 Mass. 367. *Harwood* v. *Security Mutual Life Ins. Co.*, 263 Mass. 341; *Richards* v. *Richards*, 270 Mass. 113; *Universal Adjustment Corp.* v. *Midland Bank Ltd. of London*, 281 Mass. 303. *Charney* v. *Charney*, 316 Mass. 580. *Lenn* v. *Riché*, 331 Mass. 104.
[42] *Thwing* v. *Great Western Insurance Co.*, 111 Mass. 93; *Ames* v. *McCamber*, 124 Mass. 85; *Deutch* v. *Pratt*, 149 Mass. 415; *Conn. Mut. Fire Ins. Co.* v. *Wm. Knabe & Co. Manuf. Co.*, 171 Mass. 265; *Millard* v. *Brayton*, 177 Mass. 533; *Callender, McAuslan & Troup Co.* v. *Flint*, 187 Mass. 104; *Gordon* v. *Knott*, 199 Mass. 173; *Wilde* v. *Wilde*, 209 Mass. 205; *Davis* v. *N. Y. Life Ins. Co.*, 212 Mass. 310; *Schmoll Fils & Co. Inc.* v. *Wheeler*, 242 Mass. 464; *John B. Frey Co.* v. *S. Silk, Inc.*, 245 Mass. 534; *Carter-Beaver Yarn Co.* v. *Wolfson*, 249 Mass. 257; *Papadapoulos* v. *Bright*, 264 Mass. 42; *Willson* v. *Vlahos*, 266 Mass. 370; *American Realty Co.* v. *Eastern Tire Co.*, 274 Mass. 297; *Russo* v. *Slawsby*, 276 Mass. 126; *Goewey* v. *Sanborn*, 277 Mass. 168; *Lee* v. *N. Y. Life Ins. Co.*, 310 Mass. 370; *Hyfer* v. *Metropolitan Life Ins. Co.*, 318 Mass. 175. See also cases involving the contractual liability of Massachusetts shareholders in foreign corporations where the place of making rule was not recited, but it was apparently the basis for the decisions: *Hancock National Bank* v. *Ellis*, 166 Mass. 414; *Howarth* v. *Lombard*, 175 Mass. 570; *Broadway National Bank* v. *Baker*, 176 Mass. 294; *Hastings Lumber Co.* v. *Edwards*, 188 Mass. 587; *Electric Welding Co.* v. *Prince*, 195 Mass. 242; *American Spirits Mfg. Co.* v. *Eldridge*, 209 Mass. 590.
[43] *Daniels* v. *Hudson River Fire Insurance Co.*, 12 Cush. 416; *Hoadley* v. *Northern Transportation Co.*, 115 Mass. 304; *King Brick Mfr. Co.* v. *Phoenix Insurance Co.*, 164 Mass. 291; *Dolan* v. *Mutual Reserve Fund Life Insurance Co.* v. *Mut. Res. Fund Life Ins. Ass'n.*, 173 Mass. 197; *Reagan* v. *Union Mutual Life Ins. Co.*, 207 Mass. 79; *Adamowski* v. *The Curtiss-Wright Flying Service, Inc.*, 300 Mass. 281.
[44] 321 Mass. 361.

all the negotiations for a disability insurance policy took place. Nevertheless, the law of Massachusetts, where the final act making the contract binding took place, was held to govern the question of apportionment of disability payments. In *Johnson* v. *Mutual Life Ins. Co. of New York,*[45] the insured was domiciled in Mass. but the policy was made in either New York or New Hampshire. In determining the question of formal validity, a Massachusetts statute giving protection to the insured was not applied, the court holding that by the law of New York or New Hampshire, where the contract was made, that the formalities were not required. And in *Heebner* v. *Eagle Insurance Co. of Cincinnati,*[46] in construing a marine insurance policy to determine whether it covered the particular loss suffered, the court applied the law of Massachusetts, the place of making, although the policyholder, the insured vessel and the insurance company were located elsewhere.

Where contract rights concerning land are concerned, the law of the situs is generally regarded as having the closest connection with the contract. Nevertheless in *Polson* v. *Stewart,* 167 Mass. 211, the validity of a contract made in N. C. between N. C. domiciliaries to surrender marital rights in Massachusetts real estate was held governed by North Carolina law, although admittedly the fact of the marital domicile added an important element to the decision.[47]

In several cases adopting the place of making rule performance was to be elsewhere. In *Carnegie* v. *Morrison,*[48] the question of the plaintiff's right to sue on a letter of credit to which he was not one of the immediate parties was held to be governed by the law of Massachusetts, the place of making, rather than of England or Sweden where the contract was to be performed.

A similar case in accord is *Burke* v. *National Shawmut Bank,*[49] where the court decided that the construction of a Massachusetts contract as to which party bore the risk of decline in the value of the mark was governed by Massachusetts law rather than that of Germany where the contract was to be performed. In *Barrell* v. *Paine,*[50] a brokerage agreement entered into in Massachusetts for purchase and sale of securities to be performed in N. Y. was governed as to its validity in the light of a statute making gambling illegal by the law in Massachusetts.[51] And in *Weiner* v. *Pictorial Paper Pkge. Co.*[52] the court in construing a contract for permanent employment applied the law of N. Y. where the agreement became binding although the services were to be performed in New England.

In *O'Regan* v. *Cunard Steamship Co.*[53] the court had to choose between English and Massachusetts law when faced with the question

[45] 180 Mass. 407.
[46] 10 Gray 131.
[47] But compare *Milliken* v. *Pratt,* 125 Mass. 374, where domicile was held not to control a married woman's capacity to contract.
[48] 2 Met. 381.
[49] 284 Mass. 36.
[50] 242 Mass. 415, 425.
[51] See also *Marshall* v. *James,* 252 Mass. 306.
[52] 303 Mass. 123.
[53] 160 Mass. 356.

of the validity of a provision in a contract for transoceanic passage limiting the company's liability to passengers for negligence. Negotiations were made and the ticket was paid for in Massachusetts by a Massachusetts domiciliary and performance by the company was to be between Ireland and Boston. However, since the contract was finally made binding in Ireland, the court applied English law to uphold the provision. In *Shohfi* v. *Rice*[54] the law of the place of making a contract for the sale of goods was applied to determine the question of whether the contract was divisible, giving the plaintiff the right to reject part of the order, when the domicile of the buyer, and all the negotiations, and the probable intended place of payment were elsewhere. In both of these cases, it might be argued that the most significant contact was at the place of making—i.e. embarkation of the passenger in the *O'Regan* case and surrender of goods in the Shohfi case. However, since the court in both instances failed to state that these factors were of controlling importance and took pains to locate the place at which the obligation became fixed, they are strong authority for the place of making rule.

The dispute among courts and scholars in the field does not lend itself to an easy and completely satisfactory solution. At some point a choice must be made between the conflicting aims of flexibility and logic on the one hand and predictability and certainty on the other. It is the writer's view that in the field of contracts, at least, where security of commercial transactions is so important, the former aims, if necessary, should give way to the latter. It is therefore believed that the most satisfactory solution would be to allow parties to choose the applicable governing law, within limits, and in the absence of such a choice to allow a fixed rule to operate, preferably that of the place of making or of performance where it is fixed in one State at the time of contracting. This would tend to avoid litigation in the two possible situations. The first is where the parties think of the conflicts problem at the time of the negotiations. If it is clear to them that the courts will give effect to their clear and reasonable choice and they can agree they will stipulate in their agreement what law they intend to govern. The second is where the parties do not think ahead about the conflicts problem but do so when a dispute arises after the agreement has become binding. They will then be able to secure dependable advice as to the governing law without the necessity of going to court for a determination on the facts of the particular case.

There is little dispute as to the desirability of allowing parties some autonomy in the choice of law governing their contracts.[55]

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[54] 241 Mass. 211.

[55] See Conflict of Laws: "Party Autonomy," 57 Colum. L. Rev. 553; Note, Commercial Security and Uniformity through Express Stipulations in Contracts as to Governing Laws; 62 Harv. L. R. 647; Yatema, Autonomy in Choice of Law in U. S., 1 N. Y. Law Forum 46; Rheinstein, Book Review of Essays on the Conflict of Laws by Falconbridge, 15 U. Chi. L. R. 478, Wolff, Private Int'l Law 413, 428; Cook, Contracts & Conflict of Laws. Intention of Parties, 32 Ill. L. R. 899. 2 Rabel, The Conflict of Laws, A Comparative Study, 430, Chapters 28 and 29. See 2 Wharton, A Treatise on the Conflict of Laws, § 397, 3d ed., 1905. Corbin on Contracts, § 1446. It is the rule in England. See Dicey, Conflict of Laws, 724-731.

What criticism exists is based on the purely conceptual contention that to do so, at least as regards questions relating to the validity of the contract, "involves a delegation of sovereign power to private individuals" and makes a "legislative body" of them.[56] Were the choice being allowed in relation to the validity of contracts having no out-of-state contacts, perhaps this criticism would be justified. However, in contracts with multistate relations the choice of law problem is anterior to any decision on the merits under local contract law, and the local law of the place of making cannot be applied until the conflicts decision is made. Until that decision is made, the local law does not govern the precise case and the individual parties choosing another law have not "evaded" any law applicable to their actions.[57] Certainly when the question concerns the construction of the contract there can be no objection to the parties' choice, as they are free within the limits of legality to write into their contract any terms they wish.

This is not to say that the parties should be unlimited in their choice. Where the question is related to the validity of their undertaking, it is generally agreed[58] that in order to prevent evasion the chosen law must have some substantial connection with the contract. Where the question relates to the construction of the contract there is no reason for such a limitation. A choice of a completely unrelated law might be merely a short-cut for the parties to avoid spelling out an otherwise lengthy agreement. Some authorities would reject the choice of an unrelated law even in such a case on the ground that it would place an undue burden on the court, possibly necessitating an inquiry into an exotic foreign legal system.[59] These problems are likely to arise so infrequently that to limit the parties' choice on their account would seem to be most unrealistic.

Another limitation on the parties' choice would, of course, be the strong public policy of the forum which would be applied when in conflict with the chosen law. A further limitation to avoid evasion would be to look to the strong public policy of the otherwise applicable law,—which would probably be the place of making—and apply that law where it conflicts with the chosen law. In addition, in each case a careful examination should be made to see if there has been effective consent by both parties or whether the provision is contained in a contract of "adhesion." Even with these limitations, there are wide areas for parties to exercise their choice, and an extension of the use of this means of achieving certainty in

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[56] Beale, What Law Governs the Validity of a Contract, 23 Harv. L. R. 260; Minor: Treatise on Conflict of Laws, § 161; Goodrich, Handbook of the Conflict of Laws, Chapter 7; Lorenzen, Validity & Effects of Contracts in Conflict of Laws, 30 Yale L. J. 655, 658.

[57] See Cook, Logical and Legal Bases of the Conflict of Laws, 389-414.

[58] See Nesom, Intention of the Parties—The Requirement of Substantial Connection, 10 La. L. R. 346; Annot. 112 A.L.R. 124. Compare Conflict of Laws, Effect of Stipulation that Contract be Construed by Law of State Having No Relation to Contract, 86 U. of Pa. L. R. 98.

[59] See Rheinstein, Book Review—Falconbridge, Essays on the Conflict of Laws, 15 U. of Chi. L. R. 478, 487.

contractual relations has very great possibilities. The failure of the Restatement to recognize this is one of its most glaring weaknesses.

A limited number of situations may exist where something short of an express stipulation as to the governing law in the contract might be sufficient to invoke that body of law.[60] An example would be where legal terminology peculiar to one jurisdiction related to the contract is used. An extension of this theory might be said to explain the usual rule regarding the defense of usury—i.e. that where the interest rate charged is supported by the law of one of the jurisdictions bearing a substantial relation to the contract, the usury defense will fail.[61] The parties might be said to be demonstrating an agreed-upon intent to have the law of the more lenient jurisdiction govern. It is believed, however, that the extension of the parties' choice beyond the written word in the contract should be strictly limited as such an extension would bring the court into the uncertain and unpredictable area of presumed intent in cases where the parties may not in fact have come to any agreement as to the governing law.

The difficult problem arises when the parties have not adverted to the conflicts question before coming to an agreement. Because they make inevitable the absence of predictability of result without litigation, the presumed intent and the center of gravity theories are believed to be unsound. The presumed intent theory may be discarded first since it provides only an opportunity for a judicial guess.[62] The "center of gravity" theory on the other hand has a great deal of logic to commend it.[63] Under it questions may be separated so that the jurisdiction whose policy is most closely concerned with the particular aspect of the agreement in dispute may have its law applied. Furthermore, giving control to the law of the state most vitally concerned would probably adhere most closely to what the parties would have expected had they thought about the problem in advance. But, as pointed out above, it would be impossible for an attorney advising the parties when a dispute arose to predict with certainty which contact the court would eventually hold to be most significant. Since the process would

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[60] See Cook, "Contracts" and the Conflict of Laws—Intention of the Parties, 32 Ill. L. Rev. 899, 917.

[61] See *Seeman* v. *Philadelphia Warehouse Co.*, 274 U. S. 403; 2 Beale, Conflict of Laws, § 347.4; Goodrich, Handbook of the Conflict of Laws, § 111; 2 Rabel, The Conflict of Laws: A Comparative Study, 408.

[62] The "presumed intent" approach is approved in 2 Rabel, the Conflict of Laws, a Comparative Study, 357; Dicey, Conflicts of Laws (7th ed.) (1958) 717; and Morris, "The Proper Law of a Contract—A Reply," 3 Int. L. Q. 197. It is criticised in Cook, Contracts and Conflicts of Laws—Intention of the Parties, 32 Ill. L. R. 899, 919.

[63] See *Auten* v. *Auten*, 308 N. Y. 155, 160, 161, and cases cited. The theory is approved in the following treatises and articles: Nussbaum, Conflict Theories of Contracts; Cases vs. Restatement, 51 Yale Law Journal, 893; Cheshire, Private Int'l Law, Chapter 8; Morris and Cheshire, The Proper Law of a Contract in Conflict of Laws, 56 Law Quarterly Rev. 320; Harper, Policy Bases of the Conflict of Laws; Reflections on Rereading Professor Lorenzan's Essays, 56 Yale L. J. 1155, 1163-1168. Lipskin, Brunschurg, Jerie and Rodman, The Proper Law of the Contract, 12 St. John's L. R. 242; Conflict of Laws and Discharge of Contracts—An Approach, 57 Colum. L. R. 700; Cook, "Contracts" and the Conflict of Laws; "Intention" of the Parties, 32 Ill. L. R. 899, 918-919. See for adverse criticism, McCrea, The Accumulation of Contract Points Theory in the Conflict of Laws, 4 Wes. R. L. R. 381.

inevitably involve a case-by-case determination on the particular facts, there would be no body of law for ready reference. It is believed, therefore, that adoption of the center of gravity approach would be highly impracticable.

The choice remains, then, between the law of the place of making and the law of the place of performance, or some combination of the two. Resort to the law of the place of performance in all instances would not be workable since in many contracts the place of performance is not agreed upon, or is to occur in more than one jurisdiction. Where there is no reference in the agreement to one particular place of performance, a rule looking to the performance state would suffer from lack of predictability. However, where one place is agreed upon for the entire performance, that place is usually one with a vital connection to the contract and application of its law would provide a high degree of certainty to the parties as to their rights and duties.[64] It is believed, therefore, that in this rather limited situation effect should be given to the law of the place of performance.

In all other cases, it is believed most practical to look to the law of the place of making.[65] It is admitted that this result is not without problems. There is in it some degree of uncertainty in that the forum state will in each case have to decide where the last act making a binding contract occurred or would have occurred were it not for the contract's invalidity, and it will do so on the basis of its own local law of contracts which will inevitably vary somewhat from state to state. There will never, therefore, be absolute uniformity of result regardless of what forum is chosen. However, there are ordinarily severe practical limitations on the choice of forum, so that in many cases where the forum will be is fairly certain ahead of time. Another problem inherent in the place of making theory is that it is often fortuitous and the law applicable under it may bear no important relation to the contract. Given the normal contract rule that an agreement entered into by correspondence becomes binding upon communication of the acceptance which could take place anywhere, this is certainly true. However, it is the only theory that points to but one applicable law, and what that law is, is readily ascertainable by reference to an existing separate well-developed body of precedent—the forum's local law of contracts.[66] For this reason, from a practical viewpoint it should be referred to in the absence of an express choice by the parties and in the absence of one agreed-upon place for performance. Acceptance of this view does not imply an acceptance of the highly

[64] The place of performance rule was advocated by Story, in Conflict of Laws (8th ed.) (1904), § 280.

[65] See Goodrich, Handbook on Conflict of Laws (3rd ed.) (1949), 312-334; 2 Beale, Conflict of Laws, § 332.4; Developments in the Law—Conflict of Laws, 50 Harv. L. R. 1119, 1158.

[66] To the extent that the Restatement devotes a substantial number of sections to defining the last act in various situations, it is to be criticized. These sections are not part of the field of Conflict of Laws, but rather of the local law of contracts and belong, if anywhere, in the Restatement of Contracts.

conceptualistic "territorial" or "vested rights" theory of Professor Beale[67] which regards the place of making as the *only* jurisdiction capable of determining the validity of a contract. It is believed that this argument has been satisfactorily answered.[68]

A further problem is to determine the area in which the above discussed proposed rules should operate. Certainly they should control questions of validity, including formal requirements, capacity of the contracting parties,[69] whether or not there has been effectual consent, consideration, the effect of misrepresentation, mistake or duress, and the construction and effect of language used. The question is where, if at all, the line should be drawn between these questions on the one hand and performance on the other. In attempting to solve this problem the Restatement, § 358, declares that "The duty for the performance of which a party to a contract is bound will be discharged by compliance with the law of the place of performance of the promise with respect to (a) the manner of performance; (b) the time and locality of the performance; (c) the person or persons by whom or to whom performance shall be made or rendered; (d) the sufficiency of performance; (e) excuse for nonperformance." § 370 makes the law of the place of performance applicable to the question of whether or not a breach has occurred and § 372 to the correct measure of damages. Comment b following section 358 states that the law of the place of performance "is not applicable to the point where the substantial obligation of the parties is materially altered," and it admits that "there is no logical line which separates questions of the obligation of the contract . . . from questions of performance . . ." To the extent that this distinction is not based on logic it is believed to be wrong.[70] Whether or not the performance is sufficient or constitutes a breach, and under what circumstances failure to perform will be excused are questions involving the basic rights and duties of the parties fixed for all time when the contract was entered into. The same would seem to be true of the correct measure of damages. There is no reason, then, why as to these questions the same law which governs the validity and construction of the contract should not be operative. Nor does logic demand that the law of the place of performance govern the details of performance such as the manner, time and location, the method of payment or medium of currency, or the persons by whom or to whom performance shall be rendered. Conceivably they may be regarded by the parties as a part of the substantial obligation undertaken in the contract. However, it is likely that in most cases the parties intended that these details be governed by the usages at the place of performance.

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[67] 2 Beale, Conflict of Laws, § 332.4.
[68] See page 21 and Cook, The Logical and Legal Bases of the Conflict of Laws, 389-414.
[69] See Heilman, Treatment of Capacity to Contract in Conflict of Law Cases, 32 W. Va. L. Q. 102.
[70] For criticism of the Restatement distinction see Morris, The Eclipse of the Lex Loci Solutions—A Fallacy Exploded, 6 Vanderbilt L. R. 505; Confl. of Laws and the Discharge of Contracts; An Approach, 57 Colum. L. R. 700.

If this law is looked to, it is by operation of the law of the place governing the contract in its attempt to carry out the intent of the parties to the agreement.

With regard to the legality of the contract the first question which must be answered, after considering the strong public policies of the forum, is whether or not by the governing law the making of the contract is illegal regardless of where it is to be performed.[71] If it is, then the inquiry is at an end as the contract has no validity. If it is not illegal under this test then the law of the place of intended performance must be looked to to determine whether or not performance would be illegal.[72] If it is, then a further question remains as to the effect of the illegality on the rights and obligations of the parties. Since this has been determined by the parties as part of the original undertaking, the law governing the contract is the proper law to look to for an answer to this question. The failure of the Restatement to state this principle clearly would seem to be another aspect in which a change would be desirable.

In certain special kinds of contracts, the rules herein evolved may seem unsatisfactory. In declaring the law in the form of a Restatement there would be no objection to dealing specially with particular kinds of contracts making the presence of one particular element in a state of decisive importance.[73] For example, in life insurance contracts the domicile of the insured when the agreement becomes binding might be declared to be decisive. And in contracts relating to the interests in real estate the situs might be decisive. The possibilities for elaborating this technique are limitless. Such an endeavor would increase the certainty aimed at in the rules and could effectively minimize their logical deficiencies.

JOINT ACCOUNTS IN SAVINGS BANKS

Some problems for lawyers to consider

GUY NEWHALL

In 1955 the savings banks of Massachusetts procured the adoption of Chapter 432 of the Acts of 1955, substituting a new Chapter 168 of the General Laws in place of the former chapter. Section 22 of the new statute contains the following paragraph:

"Any part or all of the deposits and interest represented by joint accounts may be withdrawn, assigned, pledged or transferred by either of the individual parties. Payment to either of the parties to a joint account while both are living shall discharge the liability of the corporation to all persons; and in the event of the death of either of the joint owners, the corporation shall be liable only to the survivor, and the payment to the survivor shall discharge the liability of the corporation to all persons."

The savings banks tried to get a new statute similar to the New York

(Continued on p. 66)

[71] See A.L.I. Restatement, Conflict of Laws, § 347. See also Williston, Contracts, § 1749; Corbin, on Contracts, § 1374.

[72] See A.L.I. Restatement, Conflict of Laws, § 360.

[73] See Conflict of Laws & The Discharge of Contracts: An Approach, 57 Colum. L. R. 700, 716.

THE PLACE OF AESTHETICS IN COMPREHENSIVE ZONING IN MASSACHUSETTS

By ROBERT L. KELSEY *of the Massachusetts Bar*

As a basis for enacting comprehensive zoning legislation one of the least satisfactory developed areas has been the extent to which aesthetic considerations alone[1] may justify such regulation.[2] At least this much seems settled, aesthetics may be taken into account as an ancillary support to some other main purpose which is within the appropriate sphere of the state's police power.[3] Logically such a position fails completely to justify aesthetics as being entitled to any consideration at all, for if the zoning regulation must find support based on some other purpose there is no need to inquire whether it can also be supported on the grounds of aesthetics. Doubtless our conception of legitimate governmental action encompassed by the phrase "police power" has undergone some change since the formulation of this rule[4]; it is because of this change that there is reason to inquire whether the previous statement of the rule correctly states the present position of the law. In upholding the District of Columbia redevelopment project the Supreme Court of the United States had occasion to say, "The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled."[5] This language in substance can be found in our Massachusetts reports[6] but it is largely as a result of this dictum that increased interest has been generated over the question whether such legislation can be sustained on aesthetic grounds alone.

It may well be that in dealing with matters involving the exercise of taxation or eminent domain powers the state has considerably more latitude in choosing the objective sought to be achieved than when legislation purports to be based on the exercise of the police

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[1] As to definitions of aesthetics see references collected in Sayre, Aesthetics and Property Values, 35 A.B.A. Jour. 471, N. 5; Dukeminier, Zoning for Aesthetic Objectives, 20 Law and Contem. Prob. 218, 228, N. 33.

[2] The most searching article on the whole problem is Baker, Legal Aspects of Zoning, Chap. 1. See also Gardner, The Massachusetts Billboard Decision, 49 Harv. L. Rev. 869; Sayre, Aesthetics and Property Values, 35 A.B.A. Jour. 471; Rodda, The Accomplishment of Aesthetic Purposes Under the Police Power, 27 So. Cal L. Rev. 149; Dukeminier, Zoning for Aesthetic Objectives, 20 Law and Contem. Prob. 218; Notes, 35 B.U.L.R. 615; 39 Marq. L. Rev. 135; 35 Neb. L. Rev. 143. Consider, Toll, Zoning for Amenities, 20 Law and Contem. Prob. 266.

[3] *Opinion of the Justices*, 234 Mass. 597, 604-605 (zoning); *Ayer* v. *Commissioners on Height of Buildings*, 242 Mass. 30, 34-35 (building regulations); *General Outdoor Advertising Co.* v. *Department of Public Works*, 289 Mass. 149, 184-189, *appeals dismissed*, 296 U. S. 543, 297 U. S. 725 (billboards). For a complete collection of authority from other jurisdictions see McQuillin, Municipal Corporations sections 25.29-25.31; Rodda, The Accomplishment of Aesthetic Purposes Under the Police Power, 27 So. Cal. L. Rev. 149, N. 4.

[4] *Opinions of the Justices*, 333 Mass. 773, 778-779 and 333 Mass. 783, 787.

[5] *Berman* v. *Parker*, 348 U. S. 26, 33. See note 23, Geo. Wash. L. Rev. 730.

[6] *Lexington* v. *Govenar*, 295 Mass. 31, 36-37; *Attorney General* v. *Williams*, 174 Mass. 476, 479-480 *aff'd sub nom. Williams* v. *Parker*, 188 U. S. 491.

power.[7] Certainly Massachusetts has long recognized that the satisfaction and enrichment of the finer sensibilities of its citizens are sufficient grounds for the expenditure of public money and the exercise of the power of eminent domain. It has been held that the taking of land for a highway was for a public purpose although the end objective of the taking was to furnish access to pleasant natural scenery.[8] It has also been held permissible to hold band concerts at public expense,[9] to erect monuments, statues, gates, archways, memorial halls, to provide for decorations upon public buildings and other public ornaments, and to engage in public celebration.[10] The taking of land for public park purposes and beach areas for bathing is now firmly established[11] as is the expenditure of public money to make these premises "attractive and educational to those whose tastes are being formed and whose love of beauty is being cultivated."[12] The teaching of educational courses in art appreciation, music and literature in the public schools is even a clearer example of the power of the state to minister to the emotional and spiritual side of our nature. Since the power of the legislature to provide for the education of the people cannot be limited to provision for learning from books it would seem to be as much within the power of the legislature to educate the taste and artistic sense of the people by regulating the character of the architecture of buildings as it is to establish architectural schools where the subject of art may be taught.[13]

Where the exercise of legislative power results in depriving a person of some use of his property which he previously enjoyed, with no provision for compensation it has been accepted generally that the exercise of such power cannot be based on aesthetics alone.[14] But practically speaking, it is only through the exercise of such power that it seems possible to conserve the beauty of any extended area.[15]

Quite early it was decided that the height of buildings could be regulated either on the grounds of safety from fire or promotion

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[7] *Commonwealth* v. *Boston Advertising Co.*, 188 Mass. 348, 351. *Opinion of the Justices*, 234 Mass. 597, 604.

[8] *Higginson* v. *Nahant*, 11 Allen 530.

[9] *Hubbard* v. *Taunton*, 140 Mass. 467.

[10] *Kingman* v. *Brockton*, 153 Mass. 255-256. But cf. *Boston and Roxbury Mill Dam Corp.* v. *Newman*, 12 Pick. 467 at 480.

[11] *Salisbury Land & Improvement Co.* v. *Commonwealth*, 215 Mass. 371, 374; *Burke* v. *Metropolitan District Commission*, 262 Mass. 70. Note also the series of cases involving the so-called "Back Bay" area—*Attorney General* v. *Gardiner*, 117 Mass. 492, 499; *Attorney General* v. *Williams*, 140 Mass. 329, 330-331; *Attorney General* v. *Algonquin Club*, 153 Mass. 447.

[12] *Attorney General* v. *Williams*, 174 Mass. 476, 480, *aff'd sub nom. Williams* v. *Parker*, 188 U. S. 491.

[13] An argument similar to this has been presented to the Supreme Judicial Court. *Attorney General* v. *Williams*, 174 Mass. 476, brief of the Attorney General at page 16.

[14] See authorities collected note 2, *supra*. *Welch* v. *Swasey*, 193 Mass. 364, 375, *aff'd* 214 U. S. 91 (height of buildings); *Opinion of the Justices*, 234 Mass. 597, 604-605 (zoning); *General Outdoor Advertising Co.* v. *Department of Public Works*, 289 Mass. 149, 184-189 (billboards). Regulation without compensation in billboard and zoning cases is much affected by two amendments to the Massachusetts Constitution—see the Fortieth and Fiftieth Amendments. For the role aesthetics played in the adoption of the billboard amendment consult 3 Debates in the Massachusetts Constitutional Convention, 1917-1919, pages 621-672 and Loring, A Short Account of the Massachusetts Convention, 1917-1919, Supplement to 6 N. Eng. Quart. 62-64.

[15] See Baker, Legal Aspects of Zoning, 14-15; Chandler, The Attitude of the Law Toward Beauty, 8 A.B.A. Jour. 472.

of the public health by avoiding undue concentration of construction.[16] Considerations of taste and beauty could enter in only as auxiliary supports. This view, that aesthetics could only be auxiliary props, was reinforced in an *Opinion of the Justices*[17] which expressed the position that comprehensive zoning would be constitutional. In the famous Billboard Decision Case[18] aesthetic considerations received some attention but it can hardly be said an attempt was made to place complete reliance upon that basis. The first zoning case where the role of aesthetics was considered and evaluated was *Lexington* v. *Govenar*.[19] There an attorney in violation of the zoning by-law erected in front of his home a small sign advertising his name and profession. The Court said in holding the by-law valid, "Doubtless aesthetic considerations play a large part in determining that advertising signs should not be permitted in such an area—these would seem sufficient to exclude such a use. The beauty of a residential neighborhood is for the comfort and happiness of the residents and it tends to sustain the value of property in the neighborhood. It is a matter of general welfare. . . ."[20] Expressing itself in such language it might be thought that the Court was disposed to expand its earlier position as enunciated in the *Opinion of the Justices*. However the consistent pattern in all subsequent decided zoning cases is a contraction of this position and a definite adherence to the nominal rule. In *Simon* v. *Needham*[21] in holding a zoning regulation requiring a minimum lot size of one acre for homes in a single residential area valid the decision considered as an ancillary support aesthetic considerations. *Pittsfield* v. *Oleksak*[22] presented a curious situation for there aesthetic considerations supported the conclusion that the zoning ordinance as applied to the locus was invalid the court noting that the harvesting of a matured timber crop in violation of the zoning ordinance would "not detract from or injure the natural beauty of [the] general area." Stripping large areas of land producing unsightly blighted areas in violation of a zoning ordinance was considered in *Burlington* v. *Dunn*.[23] That decision noted that "aesthetic considerations are in themselves entitled to some weight along with other considerations."

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[16] *Welch* v. *Swasey*, 193 Mass. 364, *aff'd* 214 U. S. 91; *Ayer* v. *Commissioners on Height of Buildings*, 242 Mass. 30, 34-35.

[17] 234 Mass. 597, 604-605. *Cf. Newton* v. *Belger*, 143 Mass. 598 at 599.

[18] *General Outdoor Advertising Co.* v. *Department of Public Works*, 289 Mass. 149, 184-189, *appeals dismissed* 296 U. S. 543, 297 U. S. 725, overruling *Commonwealth* v. *Boston Advertising Co.*, 188 Mass. 348.

[19] 295 Mass. 31. The following cases may be thought to involve aesthetic considerations but no evaluation of this element is evidenced in the opinion. *Spector* v. *Building Inspector of Milton*, 250 Mass. 63; *Phillips* v. *Board of Appeals*, 286 Mass. 469; *Town of Brookline* v. *Co-Ray Realty Co. Inc.*, 326 Mass. 206; *Donovan Drug Corp.* v. *Board of Appeals of Hingham*, 1957 A.S. 619; *Lawrence* v. *Board of Appeals of Lynn*, 1957 A.S. 709.

[20] 295 Mass. at page 36.

[21] 311 Mass. 560. The argument urging aesthetic considerations may be found in brief of the *Town of Needham* at page 15.

[22] 313 Mass. 553, 555.

[23] 318 Mass. 216, 222, *cert. den.* 326 U. S. 739. For other cases involving the removal of loam, soil or sand see *Wilbur* v. *Newton*, 302 Mass. 38; *Lexington* v. *Menotomy Trust Co.*, 304 Mass. 283; *Saugus* v. *B. Perini & Sons, Inc.*, 305 Mass. 403; *Billerica* v. *Quinn*, 320 Mass. 687; *Seekonk* v. *John J. McHale & Sons, Inc.*, 325 Mass. 271; *Wayland* v. *Lee*, 325 Mass. 637.

In *122 Main Street Corp.* v. *Brockton*[24] a zoning ordinance requiring all buildings in the business district of a city to exceed a height of one story was found invalid. Part of the city's unsuccessful argument for sustaining the ordinance was that "from an aesthetic sense the presence of a one-story building alongside buildings of three and four stories would create the effect of a carnival town and destroy the symmetry of the center of the city."[25] A unique situation was presented in *Circle Lounge & Grille Inc.* v. *Board of Appeal of Boston*,[26] where the question was whether a business competitor of the petitioner was a "person aggrieved" within the meaning of the Boston zoning statute. That case could be read as saying that a person is not aggrieved merely because he insists his finer sensibilities will be disturbed by the presence of trash and paper on his neighbor's premises. *Barney and Carey Co.* v. *Milton*[27] held invalid a zoning ordinance which purported to classify the plaintiff's land as residential when it was not useable for dwellings. The Court said, "Undue weight must not be given to aesthetic considerations which can only play an incidental or ancillary role to some real, substantial, and sufficient basis for the imposition of zoning restrictions. Regard for the preservation of the natural beauty of a neighborhood makes the enactment of a zoning regulation desirable but does not itself give vitality to the regulation."[28] In expressing the opinion that two bills designed to preserve the character of Nantucket and Beacon Hill would be constitutional the justices suggested that perhaps aesthetics alone might now be a sufficient basis for such legislation.[29] It would seem prudent to point out however that those opinions did not stand on one leg alone. The justices also relied quite heavily upon economic considerations and the interest of the State in the preservation of historical areas. Nevertheless similar statements from adjudicated cases can be found in other jurisdictions[30] and there are also a substantial number of ordinances from various cities designed to accomplish similar objectives.[31]

Certainly one of the chief concerns in sustaining legislation on aesthetic grounds is the possible dampening of individual initiative. Another major concern is the benefit to be gained from it all and the somewhat strongly ingrained conventional view that advancement along aesthetic lines ought to be left to the schools and the influence of social intercourse. It is accepted law that every owner has the right to build upon or otherwise to improve his land and to

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[24] 323 Mass. 646.
[25] Brief of the *City of Brockton* at pages 16-17.
[26] 324 Mass. 427.
[27] 324 Mass. 440.
[28] *Id.* at 448.
[29] *Opinions of the Justices*, 333 Mass. 773 and 333 Mass. 783.
[30] *New Orleans* v. *Levy*, 223 La. 14; *Shreveport* v. *Brock*, 230 La. 651; *State ex rel. Saveland Park Holding Corp.* v. *Wieland*, 269 Wis. 262; *Ware* v. *City of Wichita*, 113 Kan. 153; *State* v. *Houghton*, 144 Minn. 1, 13; *Material Co.* v. *Barrack*, 118 W. Va. 608, 612-613, and see cases collected 58 A.L.R. (2d) 1314, 1327-1330 (billboards).
[31] For the municipalities concerned consult note, 23 Geo. Wash. L. Rev. 730, 747, N. 75 and Dukeminier, Zoning for Aesthetic Objectives, 20 Law and Contem. Prob. 218, 230, N. 39 and 40 [including among others, New Orleans (Vieux Carre), Louisiana; Williamsburg, Virginia; Winston-Salem, North Carolina and Annapolis, Maryland].

use and occupy it for any lawful purpose subject to such reasonable restrictions as may be imposed in the public interest.[32] In the abstract it seems difficult to assert that the style of architecture of a house or the color of paint, if any, put upon it is a reasonable restriction upon the owner's use of his land in the public interest. Yet the maintenance of inharmonious structures in an area can and frequently does lead to indifference in upkeep, neglect and disrepair of surrounding premises. The relationship of "blighted areas" to the growth of slums and the spread of disease and crime and the consequent disproportionate expenditure of public funds for crime prevention and correction, the treatment of juvenile delinquency and the maintenance of police, fire and accident protection is so much in the foreground of today's social problems as to be matters of common knowledge.[33] The presence of incongruous structures may not only tend to increase the cost of municipal services but may depress land prices in the vicinity with consequent reflections mirrored in lower tax revenues.[34]

A possible separate ground for upholding aesthetic considerations in at least the most objectional cases is to adopt a doctrine of nuisance by sight.[35] Under this theory compliance with a zoning ordinance would afford no protection to one who uses his land in a manner which is altogether unreasonably offensive to the taste and who thus has created a private nuisance.[36] Of course one living in a city must necessarily submit to the annoyances which are incidental to that way of life and it may be exceedingly difficult to strike a medium that will perfectly adjust conflicting tastes and interests. Still balances have been struck. The keeping of pigs within a city[37] or the use of a building as a stable for more than four horses[38] has been prohibited, even though there was great need for such activity and irrespective of whether they amount to nuisances or not.

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[32] *Brett* v. *Building Commissioner of Brookline*, 250 Mass. 73, 77. *General Outdoor Advertising Co.* v. *Department of Public Works*, 289 Mass. 149, 183-184. *Kenney* v. *Building Commissioner of Melrose*, 315 Mass. 291, 294. *Karl V. Wolsey Co. Inc.* v. *Building Inspector of Bedford*, 324 Mass. 419, 420.

[33] See the treatment given this matter in *Berman* v. *Parker*, 348 U. S. 26, brief for the District of Columbia Redevelopment Land Agency and National Capital Planning Commission. See also, Johnstone, The Federal Urban Renewal Program, 25 U. of Chic. L. Rev. 301. Cf. *Opinion of the Justices*, 334 Mass. 760; *Allydonn Realty Corp.* v. *Holyoke Housing Authority*, 304 Mass. 288; *Stockus* v. *Boston Housing Authority*, 304 Mass. 507.

[34] Note, 23 Geo. Wash. L. Rev. 730, 746-749.

[35] Although an argument urging the adoption of the doctrine of nuisance by sight has been presented to the Supreme Judicial Court the court did not express a judgment as to the soundness of such a proposition. See *General Outdoor Advertising Co.* v. *Department of Public Works*, 289 Mass. 149, brief of the Department of Public Works at page 37. See also, *Nugent* v. *Melville Shoe Corp.*, 280 Mass. 469 (nitrogen light shining into sleeping room held a common law nuisance). Cf. *Tortorella* v. *H. Traiser & Co. Inc.*, 284 Mass. 497, 501, and *Stevens* v. *Rockport Granite Co.*, 216 Mass. 486, 488-489.

[36] *Tortorella* v. *H. Traiser & Co. Inc.*, 284 Mass. 497. *Weltshe* v. *Graf*, 323 Mass. 498, 500. *Malm* v. *Dubrey*, 325 Mass. 63. The following authorities report that conduct which merely offends one's tastes or aesthetic sensitiveness is usually not for that reason a nuisance: Harper, Torts, 385; Harper and James, Torts, § 1.25 at p. 77. But see Restatement, Torts, § 831, and comment c; Prosser (2d ed.), Torts, 407.

[37] *Commonwealth* v. *Young*, 135 Mass. 526. *Quincy* v. *Kennard*, 151 Mass. 563. Compare the following series of cases: *Winship* v. *Inspector of Buildings of Wakefield*, 274 Mass. 380 (hen house containing three thousand chickens was a "farm"); *Lincoln* v. *Murphy*, 314 Mass. 16 (two thousand hogs are a "piggery" not a "farm"); *Connors* v. *Burlington*, 325 Mass. 494 (not unreasonable to prohibit piggery within town limits).

[38] *Langmaid* v. *Reed*, 159 Mass. 409, 411. *Newton* v. *Joyce*, 166 Mass. 83.

Indeed the problem seems but a question of deciding whether a gas-house belong in a district already occupied by foundries, scrap factories and similar industries[39] or whether "a pig belongs in the parlor instead of the barnyard."[40] Massachusetts unlike some jurisdictions has never held that junk yards are not nuisances merely because of their unpleasant appearance[41] nor has the court said unsightliness and offensiveness to the eye are not sufficient grounds for proscribing certain conduct;[42] it would seem that adoption of the doctrine would not be embarrassed by stare decisis.

Laws are not made to suit the acute sensibilities of people but are concerned in the main with common humanity. This seems in itself a check upon the validity of legislation which purports to be based solely on aesthetic considerations. Assuming the General Court can consider aesthetic objects alone the question always would be open as to whether they have adopted a reasonable or an arbitrary and capricious method of reaching that end.[43] And, further, it is open to question whether the regulation in its specific application to the locus is reasonable.[44] Here again it seems no argument to contend that this involves a hopeless weighing process. The problems do not appear more insurmountable than those where it was held proper for a State to prohibit use of natural gas for carbon black purposes although it meant the loss of hundreds of thousands of dollars invested for that purpose,[45] or that cedar trees which were the passive carriers of a destructive rust disease could be destroyed to protect neighboring apple trees,[46] or that the taking of oil from natural pools could be regulated and production limitations established by the State,[47] that a statute designed to protect Boston harbor by prohibiting the removal of gravel or sand from any of the beaches in the town of Chelsea was constitutional,[48] or that a residential countryside may be protected against the presence of huge gravel pits by forbidding the removal of gravel from the area.[49] These cases deal with the paramount interest of the State in conserving the resources of the State for the greatest good; it is suggested that the same interest is present in preserving the identity of desirable natural and artificial constructions.

The trend of present judicial expression and the action of our Legislature does seem to favor the approval of aesthetic purposes

[39] *Dobbins* v. *Los Angeles*, 195 U. S. 223.
[40] *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 388.
[41] *Vermont Salvage Corp.* v. *St. Johnsbury*, 113 Vt. 341. *Vassalo* v. *Orange*, 125 N. J. L. 419. *Material Co.* v. *Barrack*, 118 W. Va. 608.
[42] Cases note 41, *supra*. See also, *Byrne* v. *Maryland Realty Co.*, 129 Md. 202; *Fruth* v. *Board of Affairs*, 75 W. Va. 456; *State ex rel. Sale* v. *Stahlman*, 81 W. Va. 335. Cf. *Stevens* v. *Rockport Granite Co.*, 216 Mass. 486, 488-489.
[43] *Seekonk* v. *John J. McHale & Sons, Inc.*, 325 Mass. 271, 274. *Connors* v. *Burlington*, 325 Mass. 494, 496. *Howland* v. *Acting Superintendent of Buildings and Inspector of Buildings of Cambridge*, 328 Mass. 155, 160-161. *Shannon* v. *Building Inspector of Woburn*, 328 Mass. 633, 637. *Lexington* v. *Simeone*, 334 Mass. 127, 131.
[44] *Nectow* v. *Cambridge*, 277 U. S. 183, and cases cited note 43, *supra*.
[45] *Walls* v. *Midland Carbon Co.*, 254 U. S. 300.
[46] *Miller* v. *Schoene*, 276 U. S. 272.
[47] *Railroad Commission* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573, opinion modified, 311 U. S. 614; *Railroad Commission* v. *Rowan & Nichols Oil Co.*, 311 U. S. 570.
[48] *Commonwealth* v. *Tewksbury*, 11 Met. 55.
[49] *Seekonk* v. *John J. McHale & Sons, Inc.*, 325 Mass. 271, 274, and see note 23, *supra*.

as a legitimate end of zoning. At any rate the justices have indicated that they listen to arguments which contend that the police power is not to be strictly limited to objectives conventionally thought to be encompassed by the phrase "the public health, safety, morals and welfare." Yet realistically we may expect the nominal rule—that aesthetics are only ancillary considerations—to die a slow and lingering death.

NEW QUARTERS FOR THE BAR IN THE BOSTON MUNICIPAL COURT

On September 26th Chief Justice Elijah Adlow of the Municipal Court of the City of Boston, has announced the receipt of a $1,000 check from John S. Slater, Esq., of the Boston bar. The gift will provide suitable furnishings for rooms to be opened for the convenience of the bar and the public while awaiting trials in the Boston Municipal Court, and will provide facilities made necessary by reason of the new procedure with respect to the remanding of cases to the Boston Municipal Court from the Superior Court under the recent statute.

MR. SLATER'S LETTER TO CHIEF JUSTICE ADLOW

My dear Chief Justice:

Enclosed herein is my check for $1,000 which I am giving to the Municipal Court of the City of Boston for the purpose of furnishing in appropriate fashion the conference rooms set aside for the convenience of the bar and the public.

I am making this gift out of a high regard for the members of my profession whose goodwill and favor I have always cherished.

I trust that this modest gift will contribute to their comfort and pleasure.

Sincerely, JOHN S. SLATER

Joint Accounts continued from p. 59

statute, which provides in substance that the setting up of a joint account "shall, in the absence of fraud or undue influence, be conclusive evidence, in any action or proceeding to which either the savings bank or the surviving depositor is a party, of the intention of both depositors to vest title to such deposits and the additions thereto in such survivor." The Bank Commissioner's office, however, opposed any such sweeping provision, and the paragraph quoted above from Section 22 is the result.

The question is, how far does it go. Some lawyers think it goes the whole distance and that only the survivor can withdraw the account. Others think that the new statute does not materially change the old law and that if the executor or administrator wanted to test the validity of the gift of a joint account, he could do so, joining the bank, provided the bank had not already paid the deposit to the survivor.

In recent years our Supreme Judicial Court has pretty well settled the law as to joint accounts, and gotten rid of a great deal of the confusion that prevailed in former years. The question is, how far this statute changes the rules as to joint accounts which have been developed by our high court. It is a question well worth considering. It should in the ordinary course of events reach the Supreme Judicial Court before many years have passed.

The Commonwealth of Massachusetts

By His Excellency
FOSTER FURCOLO
Governor

1958

A PROCLAMATION

There are times in the lives of free men when they must reassess the importance of the basic precepts of their heritage in the light of events which threaten to deprive them of hard won human rights.

For Americans everywhere, the voyage of Mayflower II gave new meaning to the historical report of the little band of Pilgrims who, guided by leaders of character and conscience, sailed to an unknown land in search of the freedoms we now enjoy. The story of the founding of Plymouth Colony in 1620, and the account of the settlement of the Massachusetts Bay Colony by another group of Puritans in 1630, is part of the record of the birth of the American nation. It also is the foundation of our cherished Massachusetts heritage.

The Pilgrims, before debarking, drew up and signed the famous Mayflower Compact which provided for self-government. The Puritans' charter of 1629—the original of which now is in the State House—also provided for a popular form of government. Massachusetts developed and flourished as a result of the provisions of these documents which gave free men a voice in their government.

More than 100 years later, when these rights were threatened, James Otis wrote to a friend in London, "Our Fathers were a good people, we have been a free people and if you will not let us remain so any longer we shall be a great people." That remarkable and succinct prediction of the course of our history, fulfilled and maintained by Americans who loved freedom more than life itself, is our heritage.

An understanding of the nature of our government, founded upon the courageous beliefs of our forefathers, is necessary in order to appreciate it fully. During the month of November, the Massachusetts Bar Association, on the request of high school principals, will assign a lawyer from its membership to bring to the students in school assemblies a message on their duties and rights as citizens of Massachusetts.

NOW, therefore, I, FOSTER FURCOLO, Governor of the Commonwealth of Massachusetts, in cooperation with the Massachusetts Bar Association which annually sponsors this observance, do hereby proclaim as

MASSACHUSETTS HERITAGE MONTH

NOVEMBER, 1958

and call upon our citizens of all ages to become better informed about the nature and structure of the government of our Commonwealth so that they may be vigilant in safeguarding it, as set forth in the preamble of 1780, "for ourselves and our posterity."

GIVEN at the Executive Chamber in Boston, this third day of October, in the year of our Lord one thousand nine hundred and fifty-eight, and of the Independence of the United States of America, the one hundred and eighty-third.

By His Excellency the Governor
FOSTER FURCOLO

EDWARD J. CRONIN
Secretary of the Commonwealth

God Save The Commonwealth of Massachusetts

REPORT ON THE BILL TO LIMIT DOWER AND CURTESY TO LAND OWNED AT DEATH AND THE RECENT ADVISORY OPINION OF THE JUSTICES

For two successive years this bill (Senate 388 of 1958) has been reported favorably by the Committee on Legal Affairs and passed by both the House and Senate. The "Quarterly" for October 1957 (pp. 27-29) contained a report of the facts and the following passage:

> "As land is the basic asset of the Commonwealth and its people and as title problems which obstruct marketability and reduce the value of the land, increase annually and often unjustly especially for the small landowners, the importance of questions of title reach far beyond lawyers to the clients who wish to sell or mortgage or buy the land and find themselves caught in an expensive trap of which they knew nothing.
>
> "We, therefore, submit the bill and its story for the consideration of the profession. The bill was rejected at the last stage for no recorded reason. Should the present law stay as it is indefinitely for the next hundred years or so while title problems get constantly worse?"

This year the bill again passed both Houses on July 15 after the advisory opinion of the justices and was sent to the Governor. As appears in the "Bulletin" it was recalled July 21, returned July 22, recalled July 28, returned July 30, recalled August 5 and finally returned on the last day of the session in October. It went to a "pocket veto," without a recorded reason, by failure to sign within 5 days. As the bill is part of a nationwide movement to protect not lawyers, but landowners and the marketability of land, and in view of the repeated legislative as well as professional support it will, presumably, be reintroduced in the public interest. F. W. G.

The Advisory Opinion

SENATE No. 758

SENATE, June 18, 1958.

Whereas, Senate bill numbered 388, entitled "An Act to restrict dower and curtesy claims to land owned at the death of the claimant's spouse", a copy of which is hereto annexed, is pending before the Senate; and

Whereas, Senate bill numbered 274 of 1956, which was substantially identical to said pending bill, was referred by chapter ten of the resolves of nineteen hundred and fifty-six to the Judicial Council for a report thereon; and

Whereas, A majority of said Council in its Thirty-second report in nineteen hundred and fifty-six (see pages 24–28, inclusive), recommended passage of said Senate bill numbered 274 but suggested that "the legislature may wish to ask to Court for an advisory opinion" with reference thereto; and

Whereas, Grave doubt exists as to the constitutionality of said bill if enacted into law; therefore be it

Ordered, That the opinions of the Honorable the Justices of the Supreme Judicial Court be required by the Senate on the following important questions of law:—

1. Can said pending bill, if enacted into law, constitutionally apply to inchoate rights of dower or curtesy as they existed prior to the effective date thereof under Article X of the Declaration of Rights of the Constitution of Massachusetts, section 10 of Article I of the Constitution of the United States in so far as said section forbids any state to make any law impairing the obligation of contracts, or the Fourteenth Amendment to the Constitution of the United States?

2. Can said pending bill, if enacted into law, constitutionally empower a person after the effective date thereof to deprive his spouse of such inchoate rights of dower or curtesy of such spouse as were in existence prior to said effective date under Article X of the Declaration of Rights of the Constitution of Massachusetts, section 10 of Article I of the Constitution of the United States in so far as said section forbids any state to make any law impairing the obligation of contracts, or the Fourteenth Amendment to the Constitution of the United States?

IRVING HAYDEN, *Clerk.*

To the Honorable the Senate of the Commonwealth of Massachusetts:

The undersigned Justices of the Supreme Judicial Court respectfully submit these answers to the questions set forth in an order of the Senate dated June 18, 1958, and transmitted to us on June 20. The order refers to a pending bill, Senate No. 388, entitled "An Act to restrict dower and curtesy claims to land owned at the death of the claimant's spouse."

The bill has three sections. Section 1 seeks to amend by striking out G. L. (Ter. Ed.) c. 189, § 1, and substituting the following: "A husband shall upon the death of his wife hold for his life one third of all land owned by her at the time of her death. Such estate shall be known as his tenancy by curtesy, and the law relative to dower shall be applicable to curtesy. A wife shall, upon the death of her husband, hold her dower at common law in land owned by him at the time of his death. Such estate shall be known as her tenancy by dower. Any encumbrances on land at the time of the owner's death shall have precedence over curtesy or dower. To be entitled to such curtesy or dower the surviving husband or

wife shall file his or her election and claim therefor in the registry of probate within six months after the date of the approval of the bond of the executor or administrator of the deceased, and shall thereupon hold instead of the interest in real property given in section one of chapter one hundred and ninety, curtesy or dower, respectively, otherwise such estate shall be held to be waived. Such curtesy and dower may be assigned by the probate court in the same manner as dower is now assigned, and the tenant by curtesy or dower shall be entitled to the possession and profits of one undivided third of the real estate of the deceased from her or his death until the assignment of curtesy or dower and to all remedies therefor which the heirs of the deceased have in the residue of the estate. Except as preserved herein, dower and curtesy are abolished."

Section 2 reads: "If it should be held that this act cannot constitutionally apply to rights of dower or curtesy as they existed prior to the effective date of this act, it shall nevertheless be fully effective except as to such rights." Section 3 provides that the act shall take effect on January 1, 1959.

The questions are as follows:

"1. Can said pending bill, if enacted into law, constitutionally apply to inchoate rights of dower or curtesy as they existed prior to the effective date thereof under Article X of the Declaration of Rights of the Constitution of Massachusetts, section 10 of Article I of the Constitution of the United States in so far as said section forbids any state to make any law impairing the obligation of contracts, or the Fourteenth Amendment to the Constitution of the United States?"

"2. Can said pending bill, if enacted into law, constitutionally empower a person after the effective date thereof to deprive his spouse of such inchoate rights of dower or curtesy of such spouse as were in existence prior to said effective date under Article X of the Declaration of Rights of the Constitution of Massachusetts, section 10 of Article I of the Constitution of the United States in so far as said section forbids any state to make any law impairing the obligation of contracts, or the Fourteenth Amendment to the Constitution of the United States?"

The order recites that a substantially identical bill, Senate No. 274 of 1956, was referred to the Judicial Council by c. 10 of the Resolves of 1956; and that a majority of the Judicial Council in its thirty-second report in 1956, at pages 24–28, recommended passage but suggested the possibility of an advisory opinion of the Justices. In that report we read that the purpose of the bill "is to reduce the title problems affecting the marketability of land whether by sale or mortgage" (page 25). We there are told that these problems have two chief causes: (1) The omission of a husband or wife to declare an existing marriage and to obtain the signature of the spouse to a deed. (2) The ever growing number of migratory divorces with the attendant doubt as to their validity and the con-

sequent uncertainty as to the legality of remarriage. The result might be described as a conveyancer's nightmare.

Under § 1 as now in effect, curtesy is a life estate of a surviving husband in one third of all land owned by his wife during marriage unless he has joined in a deed of conveyance or "otherwise" released his right to claim curtesy; and dower is a similar life estate of a surviving wife in one third of land owned by the husband. And see G. L. (Ter. Ed.) c. 189 § 1A. Either curtesy or dower may be "otherwise" released by a deed subsequent to the deed of conveyance executed either separately or jointly with the spouse. G. L. (Ter. Ed.) c. 189, § 5. Of course, neither can exist without a valid marriage. By statute neither survives divorce. G. L. c. 208, § 27 (as amended through St. 1949, c. 76, § 2). This, of course, means a valid divorce. During marriage the right to claim curtesy or dower is said to be inchoate. (At common law the phrase was curtesy initiate.) Upon the death of the spouse, or, at any rate, after the later assignment of a specified one third of the land, it is said to be consummate. Curtesy and dower, under § 1 in its present form, are superior to the rights of creditors. It should be noted that nothing like curtesy or dower exists as to personal property, which a husband or wife may dispose of freely without the consent of the spouse. *Redman* v. *Churchill*, 230 Mass. 415, 418. *Eaton* v. *Eaton*, 233 Mass. 351, 370. *Kerwin* v. *Donaghy*, 317 Mass. 559, 571. *National Shawmut Bank* v. *Cumming*, 325 Mass. 457, 461. *Charest* v. *St. Onge*, 332 Mass. 628, 634–635.

That the bill would violate no provision of the Federal Constitution is settled by decisions of the Supreme Court of the United States. In *Randall* v. *Kreiger*, 23 Wall. 137, decided in 1874, it was said, at page 148: "During the life of the husband the right [of dower] is a mere expectancy or possibility. In that condition of things, the lawmaking power may deal with it as may be deemed proper. It is not a natural right. It is wholly given by law, and the power that gave it may increase, diminish, or otherwise alter it, or wholly take it away. It is upon the same footing with the expectancy of heirs, apparent or presumptive, before the death of the ancestor. Until that event occurs the law of descent and distribution may be moulded according to the will of the legislature." In *Ferry* v. *Spokane, Portland & Seattle Ry.* 258 U. S. 314, decided in 1922, the court upheld a decision of the Circuit Court of Appeals for the Ninth Circuit, 268 Fed. 117, to the effect that an Oregon statute limiting the right of dower of a nonresident to land of which the husband died seised was not unconstitutional. In the *Ferry* case the Supreme Court of the United States said, at pages 318–319: "Dower is not a privilege or immunity of citizenship, either state or federal, within the meaning of the provisions relied on [§ 2 of art. 4 and the Fourteenth Amendment]. At most it is a right which, while it exists, is attached to the marital contract or relation; and it always has been deemed subject to regulation by each State as respects property within its limits. *Conner* v. *Elliott*, 18 How. 591.

. . . The cases recognize that the limitation of the dower right is to remove an impediment to the transfer of real estate and to assure titles against absent and probably unknown wives."

Turning to art. 10 of the Declaration of Rights of the Constitution of the Commonwealth, we observe in the thirty-second report of the Judicial Council that the doubt as to the validity of the bill springs from statements in several earlier decisions of the Supreme Judicial Court, in none of which, however, was the question before us presented. The question here is whether the bill if enacted would amount to a taking of property without due process of law.

The most recent of these statements was in 1914 in *Hanscom* v. *Malden & Melrose Gas Light Co.* 220 Mass. 1, which was a bill in equity to dissolve an attachment on real estate. A statute enacted subsequent to the attachment provided that no attachment should be dissolved upon property which the debtor had alienated before his death. In the course of interpreting the statute as having no retroactive effect, as otherwise unconstitutional, it was said, at page 7, "Although it has been held in some jurisdictions to be within the power of the Legislature to extinguish a wife's right of dower before it has become consummate, yet, whether such decisions are consistent with the law of this Commonwealth by which an inchoate right of dower is recognized as a property right, is open to grave doubt. *Dunn* v. *Sargent*, 101 Mass. 336, 340."

In *Dunn* v. *Sargent*, decided in 1869, it was held that a husband's common law right in his wife's personal property was vested as to a remainder in personal property after a life interest in a third person and could not be taken from him without compensation. At page 340, it was said: "It has indeed been held, by the courts of some states, that a wife's right of dower may be cut off by act of the legislature at any time before it becomes consummate upon the death of the husband. See the cases collected in 2 Scribner on Dower, c. 1. But those decisions proceed upon the theory that such a right is not an interest in property, but a mere possibility, created by law, and not in any sense vested or assignable until after the husband's death. And it may well be doubted whether they are consistent with the law of this Commonwealth, by which an inchoate right of dower is recognized as something more than a possibility, and as an interest in property, which equity will under some circumstances protect at the suit of the wife in the lifetime of the husband. *Davis* v. *Wetherell*, 13 Allen, [60,] 63."

In *Davis* v. *Wetherell*, it was held that a wife having an inchoate right of dower might bring a bill in equity to redeem land from a mortgage in which she had joined with her husband to release dower. At pages 62–63, it was said: "Her inchoate right of dower is a right of a very peculiar nature. It is a right of which nothing but her death or voluntary act can deprive her, and so it is something more than a mere possibility. Ordinary statutes of limitation do not run against it, so that adverse possession as against her husband will not deprive her of it. And although she cannot convey

or alienate it, except by joining in a deed with her husband to release it, and cannot protect it from waste, and it is not liable to be taken by legal process, yet her husband cannot bar or incumber it. As was said by Chief Justice Parker in *Bullard* v. *Briggs*, 7 Pick. 533, it is 'a valuable interest, which is frequently the subject of contract and bargain. . . . It is more than a possibility, and may well be denominated a contingent interest.' In that case it was held that where a wife joined with her husband in releasing her dower to a mortgagee, and the husband, in consideration of such release, conveyed the equity of redemption to a trustee for her benefit, the conveyance could not be avoided by his creditors, if the value of the dower was equal to that of the equity conveyed."

The question is not whether the right to claim curtesy or dower may be protected in certain circumstances, but whether it is a right protected by art. 10 of the Declaration of Rights. The right is contingent, and not vested. *Fitcher* v. *Griffiths*, 216 Mass. 174, 175. It is not based on contract but arises by operation of law. *Conant* v. *Little*, 1 Pick. 189, 191. It was said to be "subject to any incident attached to it by law" in *Flynn* v. *Flynn*, 171 Mass. 312, 315, where the holding was that a wife was not entitled to any interest in the proceeds of a taking by eminent domain of real estate of her husband in which she had an inchoate right of dower. In *Pitts* v. *Aldrich*, 11 Allen, 39, it was held that a wife need not be made a party to a suit against her husband to foreclose a mortgage on real estate in which she had an inchoate interest. In *Newhall* v. *Lynn Five Cents Sav. Bank*, 101 Mass. 428, a wife was held to have no rights as against her husband or his assignees in the proceeds of a sale of real estate by a mortgagee for breach of condition. See *Forte* v. *Caruso*, 336 Mass. ——, ——.

Dower and curtesy are of much less importance than formerly. This diminution in value is due to the great increase in the amount of personal property and in the superior alternative rights in the estate of a deceased husband or wife accorded by statute to a surviving spouse. The thirty-second report of the Judicial Council points to St. 1854, c. 406, as a source of such rights. These rights have been gradually increased by legislation. As appears from G. L. (Ter. Ed.) c. 189, § 1, and as preserved in the proposed amendment in the bill, "To be entitled to such curtesy or dower the surviving husband or wife shall file his or her election and claim therefor in the registry of probate within six months after the date of the approval of the bond of the executor or administrator of the deceased, and shall thereupon hold instead of the interest in real property given in section one of chapter one hundred and ninety, curtesy or dower, respectively, otherwise such estate shall be held to be waived." This requirement of affirmative action to avoid waiver is a recognition of the greater value of the alternative rights given a surviving husband or wife by G. L. (Ter. Ed.) c. 190, § 1, and greatly enhanced by St. 1945, c. 238, and St. 1956, c. 316. See

Seavey v. *O'Brien*, 307 Mass. 33; Swaim, Crocker's Notes on Common Forms (7th ed.) § 893.

According to the thirty-second report of the Judicial Council claims of dower or curtesy in this Commonwealth have almost ceased to be made; and, in fact, a claim of neither is advisable except under two special circumstances: "(1) if the deceased owned real estate, but died insolvent or so nearly so that the bulk of the real estate must be sold to pay the debts and expenses; and (2) if the deceased during his or her lifetime conveyed a considerable amount of real esate without procuring a release of curtesy or dower in the deed." Newhall, Settlement of Estates (4th ed.) § 213. It may be noted that statutory changes in dower as a common law incident of marriage have been made in this Commonwealth without making an exception of existing marriages. See 40 Mass. L. Q. No. 4, p. 36.

We are not surprised to learn that dower and curtesy either no longer exist or are of little practical importance in more than half the States. Powell, Real Property, §§ 217–218, Scurlock, Retroactive Legislation Affecting Interests in Land, p. 295 et seq. Tiffany, Law of Real Property (3d ed.) §§ 551, 575. Vernier, American Family Laws, §§ 167, 188-191. See Thompson, Real Property, §§ 809–810; Am. Law of Property, §§ 5.31, 5.38, 5.42; Haskins, The Estate by the Marital Right, 97 U. of P. L. Rev. 345, 352–353. For a historical statement as to both see Swaim, Crocker's Notes on Common Forms (7th ed.) §§ 1005, 1007.

The weight of authority in the United States gives support to the Legislature's power to make the changes proposed by the pending bill in the incidents of the present statutory curtesy under G. L. (Ter. Ed.) c. 189, § 1, limited as they are to a life estate arising only upon the death of the wife and subject to the election of the husband if he survives. *McNeer* v. *McNeer*, 142 Ill. 388, 394, 396–401 (as to curtesy modified by statute to a contingency upon the death of the wife). *Hill* v. *Chambers*, 30 Mich. 422, 426–427. *Duncan* v. *Duncan*, 324 Mo. 167, 171–172. *Moninger* v. *Ritner*, 104 Pa. 298, 301–302 (act protecting abandoned wife against necessity of husband joining in conveyance). *Scaife* v. *McKee*, 298 Pa. 33, 40–41, app. dism. 281 U. S. 771. *Day* v. *Burgess*, 139 Tenn. 559, 564–571. Compare *Walker* v. *Bennett*, 107 N. J. Eq. 151, 152–153; *Schmidt* v. *Gardner*, 120 N. J. Eq. 235, 238; *Anastasia* v. *Anastasia*, 138 N. J. Eq. 260, 263. Compare also *Jackson* v. *Jackson*, 144 Ill. 274, 281–283 (common law curtesy); *Mitchell* v. *Violett*, 104 Ky. 77, 81–82 (substantially common law curtesy slightly modified by statute).

With respect to dower, an interest for the protection of which some courts have shown less solicitude than for curtesy, although certain New Jersey cases and some older cases in other jurisdictions are to the contrary, the decided cases uphold the validity of the proposed changes. *Fletcher* v. *Felker*, 97 F. Supp. 755, 763 (W. D. Ark.). *Boyd* v. *Harrison*, 36 Ala. 533, 537–539. *Skelly Oil Co.* v. *Murphy*, 180 Ark. 1023. *Adams* v. *Adams*, 147 Fla. 267, 271–272,

app. dism. sub. nom. *O'Keefe* v. *Adams*, 314 U. S. 572. *Steinhagen* v. *Trull*, 320 Ill. 382, 386–388. *May* v. *Fletcher*, 40 Ind. 575, 580. *Sturdevant* v. *Norris*, 30 Iowa, 65, 70–71. *Buffington* v. *Grosvenor*, 46 Kans. 730, 734–738. *Barbour* v. *Barbour*, 46 Maine, 9, 13. *Magee* v. *Young*, 40 Miss. 164, 170–171. *In re Lawrence*, 1 Redf. Surr. (N. Y.) 310, 319–320. *Reeves* v. *Haynes*, 88 N. C. 310, 311. *Ruby* v. *Ruby*, 112 W. Va. 62, 64–66. *Bennett* v. *Harms*, 51 Wis. 251, 260–261. 20 A. L. R. 1330. See *Trustees of Schools of Township No. 1* v. *Batdorf*, 6 Ill. 2d 486, 491–493 (right of reverter); Scurlock, Retroactive Legislation Affecting Interests in Land, pp. 273–300; Powell, Real Property, § 219. Compare *In re Alexander*, 8 Dick. (N. J.) 96, 99–101.

In the light of the shrinking significance of curtesy or dower as alternatives which must be elected by a surviving husband or wife in the estate of a deceased spouse, we cannot regard the statements quoted from our cases as precluding inchoate curtesy and inchoate dower from being viewed in this Commonwealth in the same way as in a majority of the States. We are of opinion that as a matter of public policy the Legislature can restrict them in the manner proposed. Let it be conceded that each is a valuable interest and more than a possibility. Yet each is only a contingency—a contingency of waning value—which in the usual estate today is of slight importance. We think that inchoate curtesy and inchoate dower, as contingencies before the death of the predeceasing spouse, are subject to action by the Legislature, which may make an evaluation in the public interest, and determine that any slight advantage in their retention in a relatively few cases is outweighted by the far greater benefit to the general good accruing from their restriction.

To question 1, we answer, "Yes."

Believing that this answer covers all that is intended to be asked by question 2, we respectfully request that we be excused from making a separate answer to question 2.

RAYMOND S. WILKINS. HAROLD P. WILLIAMS.
JAMES J. RONAN. EDWARD A. COUNIHAN, JR.
JOHN V. SPALDING. ARTHUR E. WHITTEMORE.

JUNE 27, 1958. R. AMMI CUTTER.

NEWS ITEMS

The American Bar News of October 15 announces that "The cash prize in the Ross Essay competition for 1959 has been upped from the usual $2,750 to $3,000. The subject for the essay contest: *'Is There Federal Encroachment On State Rights Which Should Be Curbed?'*"

The Plymouth County Bar Association plans to issue a 2-4 page bulletin beginning in November with occasional supplements.

Sampel P. Sears, a former president of the association, was recently elected as President of the American College of Trial Lawyers.

AN INVITATION FROM A FORMER CHIEF JUSTICE OF MASSACHUSETTS

(Reprinted from 36 Mass. Law Quart., No. 2, July, 1951 p. 25)

(By former Chief Justice Stanley E. Qua at the Massachusetts Lawyers' Institute, June 12, 1948, Renewed in 1951)

The Supreme Judicial Court, like every court of last resort from which there is no appeal, is under a great public responsibility of which the court is very conscious. There is, however, the ultimate test of professional opinion which is faced by every American court.

Our court of appeals is the legal profession. Our corrective influence comes from you, comes from the practising lawyers of the Commonwealth, comes from the professors of law, comes from the writings in the law reviews in general and from actions of other courts, in passing upon what we have done upon similar situations. Therefore, in order that we may have that corrective influence and have something to take the place of an appeal, it is necessary that we should first write opinions, so that the profession can read that which we have done—and, on behalf of the court, I ask you to read the decisions critically—but to read them before criticizing. I will be very much pleased indeed if, at any time, any member of the bar, or other person who knows something of the subject, is interested in a case—I don't mean interested personally—I mean interested in a subject, he will write any criticism that he has of a decision, or a line of decisions, provided, of course, it is thoughtful and intelligent criticism; and I know that the court will be helped by it.

So I say that the court is always dependent upon professional opinion for corrective criticism, and it is my earnest hope that that influence will be brought to bear, and that each member of the bar will feel the responsibility that rests upon him as a member of the profession—and this goes for other judges as well—if he sees a mistake, to call our attention to it. Anything of that kind that you can do will help us out in the performance of our duties, relieve us to some extent from the weight of responsibility and will be thoroughly appreciated. I value the opportunity of being here to say that to you tonight.

THE REASON FOR REPRINTING THE INVITATION

I think the receptive professional spirit of the foregoing invitation should govern the approach to the report of the chief justices and Dean Griswold's address which appear in the following pages.

F. W. G.

THE CONSTITUTIONAL PRINCIPLE OF JUDICIAL SELF-CONTROL—A CHALLENGE TO BALANCED PROFESSIONAL THINKING

The nationwide importance of this subject and some apparent misunderstandings in regard to it seem to us to call for conveniently accessible information to assist the profession, especially in Massachusetts, to meet the great challenge to individual thinking in regard to it. Hence what follows. F. W. G.

The Report and Resolution of the National Conference of Chief Justices at Pasadena, California, August, 1958, on Federal-State Relationship as Affected by Judicial Decisions —A Somewhat Controversial but Historic Document

FOREWORD

We were reminded of former Chief Justice Qua's invitation to lawyers and judges, at the recent meeting of the American Bar Association in Los Angeles by the address, at the dinner of the Section on Judicial Administration, of Chief Justice Dethmers of the Supreme Court of Michigan—the Chairman of the National Conference of Chief Justices.

Reporting on the work of the Conference on the tenth anniversary of its organization, after outlining the various problems of the profession which had received consideration during the past ten years, he closed with a discussion of the history and substance of the report and resolution prepared by a Special Committee of Chief Justices of ten widely scattered states which had been adopted by a vote of 36 of the representatives of the Supreme Courts of 48 states of the Union. Naturally the report has attracted wide-spread and controversial attention in conversation and in the press but not always with understanding of its contents, its cause and its purpose. It is not an attack on the court.

We have received from Chief Justice Dethmers a copy of his address and copies of the report and resolution, the report covering 31 typewritten pages.* It has been printed in full in the "U. S. News & World Report" for October 3, 1958 (pp. 92-102) and will be printed in other publications.

As the copy in the "U. S. News & World Report" is embroidered with various news-printing devices and editorial emphasis which, in our opinion, do not invite the needed calm thinking, we reprint the speech of Chief Justice Dethmers, parts of the report and the resolution adopted. We follow them with extracts from various earlier writings. These may be found suggestive to the bench and

* Mimeographed copies may be obtained for $1.00 each from the Secretary of the Conference at the office of the Council of State Governments, 1313 East 60th St., Chicago 37, Illinois.

bar in considering the intangibles of the judicial function under a balanced constitutional system of federal and local government necessarily involving judicial, as well as legilsative and executive, "self-restraint" with which the report of the Chief Justices is concerned. The report is neither a hasty or a sectional one. It was prepared, as already stated by a committee of ten from widely scattered states as shown by the following list.

FREDERICK W. BRUNE,
Chief Judge of Maryland,' Chairman.

ALBERT CONWAY,
Chief Judge of New York.

JOHN R. DETHMERS,
Chief Justice of Michigan.

WILLIAM H. DUCKWORTH,
Chief Justice of Georgia.

JOHN E. HICKMAN,
Chief Justice of Texas.

JOHN E. MARTIN,
Chief Justice of Wisconsin.

MARTIN A. NELSON,
Associate Justice of Minnesota.

WILLIAM C. PERRY,
Chief Justice of Oregon.

TAYLOR H. STUKES,
Chief Justice of South Carolina.

RAYMOND S. WILKINS,
Chief Justice of Massachusetts.

THE POWER OF JUDICIAL SELF RESTRAINT

From an address delivered by CHIEF JUSTICE JOHN R. DETHMERS, *of the Supreme Court of Michigan, Chairman of the Conference of Chief Justices, at the Annual Dinner of the American Bar Association Section of Judicial Administration at Los Angeles on August 25, 1958.*

Ten years ago, leaders of the American Bar Association Section of Judicial Administration conceived the idea of an organized conference of the states' Chief Justices. As a direct consequence, it came into formal existence the following year. The tenth annual meeting of the Conference of Chief Justices has just concluded.

Formation of the Conference was prompted by the belief that it could become a forum of consultation at the highest level on means for overhauling and modernizing state court systems, and that it would afford the opportunity for comparing notes and pooling information on state judicial methods and problems, leading to improvements in court structure, organization and function in the several states.

[After referring to a variety of problems to which the Conference had directed its attention Chief Justice Dethmers proceeded as follows:]

Of transcendent importance to the nation, overshadowing all others in the concern of the Conference, is the matter of Federal-State Relationships as affected by judicial decisions. Increasingly,

in recent years, members of the Conference had been expressing themselves in terms sharply critical of what they viewed as a trend in this area. Accordingly, at the sessions of the Conference in Dallas, two years ago, the formal program was in large part devoted to the subject of the division of powers between the Federal and State Governments. In New York, last year, several members urged adoption of resolutions strongly condemnatory of that asserted trend. The majority, shunning hasty or precipitate action, determined on the appointment of a committee to devote the ensuing year to a study of the subject and to report to the 1958 session with recommendations for achieving sound and appropriate relationships. The committee, upon appointment, engaged the assistance of a number of law professors for research in several areas of the general subject. Each of them prepared an excellent monograph based on study and research on specific constitutional questions and United States Supreme Court decisions relating thereto. These afforded much assistance to busy committee members. On such foundation, the committee drafted a scholarly and comprehensive report. It was presented to the full Conference last Wednesday morning, as were personal reports by two of the professors; the Conference divided into four sections Wednesday afternoon for piecemeal consideration and discussion of the report, and at the concluding session, last Saturday, the Conference, by an overwhelming majority, adopted a resolution approving the report and making certain observations, expressions of belief, and recommendations in the premises. This did not come about in haste or in a spirit of rancor, but upon calm reflection, careful consideration and in a spirit of humility and love for American freedoms and our free institutions, with a view to calling attention, respectfully, to matters of grave concern to the Conference and to the country.

Time will not permit, nor is this the occasion for detailing the treatment in the report of specific phases of the subject and the decisions of the United States Supreme Court relating thereto. Copies of the report are available and we would commend it to the careful and appraising examination of each of you. In general, it expresses the concern of its framers and adopting members of the Conference over the constant expansion of the powers of the national government and consequent contraction of the powers of state and local governments, which result from Supreme Court interpretations of constitutional and statutory provisions. Note is taken of what is viewed as an assumption by the Court of the legislative function and the role of policy maker in this area of Federal-State Relationships.

Maintenance of the historic division of powers between national and state governments, and retention of the highest possible degree of local self government compatible with national security and well-being, are deemed of the utmost importance by members of the Conference, as they were by the founding fathers, only as they serve

as effective instrumentalities for the preservation of the liberties of the people and the perpetuation of our free institutions. No other, or sectional, interest was sought to be subserved by the report.

It is the feeling of the members of the Conference that, as judicial officers, entrusted by the people with positions of high responsibility and trust, they would be remiss in their duties, indeed, if they were to cower in a corner and neglect to speak out in temperate tone, to alert the public to trends and developments of tremendous moment to the people. Particularly is this true in view of the peculiar training, experience and contact with events that especially equip Justices of the State Appellate Courts to discern such trends and to appreciate their significance. Where can it be said that greater obligation rests than on them to call public attention to a gradual sapping of state and local powers and rights, portending peril to the rights of the people? Inasmuch as the people must make the final judgments on these matters, existence of the problems and the involvements must be proclaimed. It is intended that the report shall serve that office.

Abraham Lincoln once said that resistance to decisions of the Supreme Court "meant an attack on our whole system of republican government, a blow that would place all our rights and liberties at the mercy of passion anarchy and violence." The Conference has moved in full recognition of the utter importance of upholding public confidence in the Courts and the judicial process, and the high duty of lawyers and Judges to upbuild it. Constitutional guarantees of freedoms and liberties avail but little except as the Courts breathe the breath of life into them and make them effective and meaningful. This they can only do, successfully, as they are supported by the public. As American Bar President Charles S. Rhyne has said so pointedly: "Our free institutions and system of government are no stronger than the public opinion supporting them." Accordingly, you will find the Conference report, despite certain newspaper headlines to the contrary, completely temperate and restrained, couched in terms of fullest respect for the United States Supreme Court as an institution of government charged with responsibility for giving life to human liberties, and also respect for the intelligence and integrity of the members of that Court.

At the same time, in a government by the people, views on vital national issues not only may, but must be voiced if that system is to be maintained. It will be recalled that Abraham Lincoln, also, in discussing the Dred Scott decision, said "We know the Court that made it has often overruled its own decisions and we shall do what we can to have it overrule this. We offer no resistance to it." We do not forget that Mr. Justice David J. Brewer of the United States Supreme Court, speaking in 1898, said "It is a mistake to suppose that the Supreme Court is either honored or helped by being spoken of as beyond criticism." The Conference report, so far from attack-

ing the Court, expresses only its concern with certain of the decisions. It contains no applause for suggestions on the political front that the Court be stripped, by Congressional action, of any of its traditional powers. The power of the Court to uphold and preserve human liberty and the rights of the people must not be crippled, curbed or destroyed. The Conference report would have none of this. It concludes, therefore, in most respectful and temperate terms, and with extreme restraint, to urge upon the Court, that, particularly in the field of determining Federal and State powers and relationships, it exercise that greatest of all judicial powers, the power of judicial self-restraint, by constant recognition and giving effect to the vital difference between what, on the one hand, the Constitution prescribes or permits and that which, on the other, may, from time to time, to the majority of the Court, seem desirable or undesirable, and by adhering firmly to its tremendous, strictly judicial powers and eschewing so far as possible the exercise of essentially legislative powers, contenting itself with use of the policy-making role, where at all necessary, with only the utmost care and moderation. Such is the general tenor of the report, offered in a spirit of good will and cooperation in the public interest. If, perchance, it should come to the attention of the esteemed members of the Court, it is our fervent wish and hope that it will be received and considered in like fashion.

Mention has been made of the dread responsibility of members of bench and bar for enhancing the prestige of Courts and the judicial process in public esteem and the consequent duty to criticize court decisions, if at all, with only the greatest restraint. That responsibility and that restraint must be deemed to apply not only to the critic but as well to the formulator of court opinions and the making of court decisions. We, lawyers and judges, share, as advocates, as critics and as final arbiters of right and law, one common responsibility to the people in that regard. If, in public appraisal, we do not make our system work, as an instrument for good and for human freedom, it must fail.

May I conclude by thanking our splendid and genial Chairman, Mr. Justice Clark, for the many courtesies extended to our Conference and its members, for his great contribution to our entertainment and enjoyment of the 1958 meeting, and, above all, for his patient understanding, as Chairman of this Section, of our problems, program and purpose.

My thanks and those of the Conference go to the American Bar Association, and the Section of Judicial Administration, for making our Conference a reality and its continued existence possible. We bespeak your understanding and support of our efforts and pledge the same to you in all your great endeavors furthering our common goal of improved administration of justice.

THE RESOLUTION

The Conference of Chief Justices on Aug. 23, 1958, adopted a resolution submitted by its Committee on Federal-State Relationships as Affected by Judicial Decisions. Vote on the resolution was 36 to 8, with 2 members abstaining and 4 not present. Text of the resolution:

Resolved:

1. That this Conference approves the Report of the Committee on Federal-State Relationships as Affected by Judicial Decisions submitted at this meeting.

2. That, in the field of federal-State relationships, the division of powers between those granted to the National Government and those reserved to the State Governments should be tested solely by the provisions of the Constitution of the United States and the Amendments thereto.

3. That this Conference believes that our system of federalism, under which control of matters primarily of national concern is committed to our National Government and control of matters primarily of local concern is reserved to the several States, is sound and should be more diligently preserved.

4. That this Conference, while recognizing that the application of constitutional rules to changed conditions must be sufficiently flexible as to make such rules adaptable to altered conditions, believes that a fundamental purpose of having a written Constitution is to promote the certainty and stability of the provisions of law set forth in such a Constitution.

5. That this Conference hereby respectfully urges that the Supreme Court of the United States, in exercising the great powers confided to it for the determination of questions as to the allocation and extent of national and State powers, respectively, and as to the validity under the Federal Constitution of the exercise of powers reserved to the States, exercise one of the greatest of all judicial powers—the power of judicial self-restraint—by recognizing and giving effect to the difference between that which, on the one hand, the Constitution may prescribe or permit, and that which, on the other, a majority of the Supreme Court, as from time to time constituted, may deem desirable or undesirable, to the end that our system of federalism may continue to function with and through the preservation of local self-government.

6. That this Conference firmly believes that the subject with which the Committee on Federal-State Relationships as Affected by Judicial Decisions has been concerned is one of continuing importance, and that there should be a committee appointed to deal with the subject in the ensuing year.

EXTRACTS FROM THE REPORT OF THE COMMITTEE

Your Committee on Federal-State Relationships as Affected by Judicial Decisions was appointed pursuant to action taken at the 1957 meeting of the Conference, at which, you will recall, there was some discussion of recent decisions of the Supreme Court of the United States and a Resolution expressing concern with regard thereto was adopted by the Conference. . . .

Background and Perspective

We think it desirable at the outset of this report to set out some points which may help to put the report in proper perspective, familiar or self-evident as these points may be.

First, though decisions of the Supreme Court of the United States have a major impact upon federal-State relationships and have had such an impact since the days of Chief Justice Marshall, they are only a part of the whole structure of these relationships. These relations are, of course, founded upon the Constitution of the United States itself. They are materially affected not only by judicial decisions but in very large measure by acts of Congress adopted under the powers conferred by the Constitution. They are also affected, or may be affected, by the exercise of the treaty power.

Of great practical importance as affecting federal-State relationships are the rulings and actions of federal administrative bodies. These include the independent-agency regulatory bodies, such as the Interstate Commerce Commission, the Federal Power Commission, the Securities and Exchange Commission, the Civil Aeronautics Board, the Federal Communications Commission and the National Labor Relations Board.

Many important administrative powers are exercised by the several departments of the executive branch, notably the Treasury Department and the Department of the Interior. The scope and importance of the administration of the federal tax laws are, of course, familiar to many individuals and businesses because of their direct impact, and require no elaboration.

Second, when we turn to the specific field of the effect of judicial decisions on federal-State relationships, we come at once to the question as to where power should lie to give the ultimate interpretation to the Constitution and to the laws made in pursuance thereof under the authority of the United States. By necessity and by almost universal common consent, these ultimate powers are regarded as being vested in the Supreme Court of the United States. Any other allocation of such power would seem to lead to chaos. See Judge Learned Hand's most interesting Holmes Lectures on "The Bill of Rights" delivered at the Harvard Law School this year and published by the Harvard University Press.

Third, there is obviously great interaction between federal legis-

lation and administrative action on the one hand and decisions of the Supreme Court on the other, because of the power of the Court to interpret and apply acts of Congress and to determine the validity of administrative action and the permissible scope thereof.

Fourth, whether federalism shall continue to exist and, if so, in what form is primarily a political question rather than a judicial question. On the other hand, it can hardly be denied that judicial decisions, specifically decisions of the Supreme Court, can give tremendous impetus to changes in the allocation of powers and responsibilities as between the federal and State governments. Likewise, it can hardly be seriously disputed that on many occasions the decisions of the Supreme Court have produced exactly that effect.

Fifth, this Conference has no legal powers whatsoever. If any conclusions or recommendations at which we may arrive are to have any effect, this can only be through the power of persuasion.

Sixth, it is a part of our obligation to seek to uphold respect for law. We do not believe that this goes so far as to impose upon us an obligation of silence when we find ourselves unable to agree with pronouncements of the Supreme Court—even though we are bound by them—or when we see trends in decisions of that Court which we think will lead to unfortunate results.

We hope that the expression of our views may have some value. They pertain to matters which directly affect the work of our State courts. In this report we urge the desirability of self-restraint on the part of the Supreme Court in the exercise of the vast powers committed to it. We endeavor not to be guilty ourselves of a lack of due restraint in expressing our concern and, at times, our criticisms in making the comments and observations which follow.

The Views of the Late Chief Justice Vanderbilt of New Jersey
(Quoted in the report)

The views expressed by our late brother, Chief Justice Arthur T. Vanderbilt, on the division of powers between the national and state governments—delivered in his addresses at the University of Nebraska and published under the title "The Doctrine of the Separation of Powers and Its Present Day Significance"—are persuasive. He traced the origins of the doctrine of the separation of powers to four sources: Montesquieu and other political philosophers who preceded him; English constitutional experience; American colonial experience; and the common sense and political wisdom of the Founding Fathers. He concluded his comments on the experiences of the American colonists with the British government with this sentence: "As colonists they had enough of a completely centralized government with no distribution of powers and they were intent on seeing to it that they should never suffer such grievances from a government of their own construction."

His comments on the separation of powers and the system of checks and balances and on the concern of the Founding Fathers

with the proper distribution of governmental power between the nation and the several states indicates that he treated them as parts of the plan for preserving the nation on the one side and individual freedom on the other—in other words, that the traditional tripartite vertical division of powers between the legislative, the executive and the judicial branches of government was not an end in itself, but was a means towards an end; and that the horizontal distribution or allocation of powers between national and state governments was also a means towards the same end and was a part of the separation of powers which was accomplished by the federal Constitution. It is a form of the separation of powers with which Montesquieu was not concerned; but the horizontal division of powers, whether thought of as a form of separation of powers or not, was very much in the minds of the framers of the Constitution.

Two Major Developments in the Federal System

The outstanding development in federal-state relations since the adoption of the national Constitution has been the expansion of the power of the national government and the consequent contraction of the powers of the state governments. To a large extent this is wholly unavoidable and indeed is a necessity, primarily because of improved transportation and communication of all kinds and because of mass production. On the other hand, our Constitution does envision federalism. The very name of our nation indicates that it is to be composed of states. The Supreme Court of a bygone day said in *Texas* v. *White*, 7 Wall. 700, 721 (1868): "The Constitution, in all its provisions, looks to an indestructible Union of indestructible States."

Second only to the increasing dominance of the national government has been the development of the immense power of the Supreme Court in both state and national affairs. It is not merely the final arbiter of the law; it is the maker of policy in many major social and economic fields. It is not subject to the restraints to which a legislative body is subject. There are points at which it is difficult to delineate precisely the line which should circumscribe the judicial function and separate it from that of policy-making. Thus, usually within narrow limits, a court may be called upon in the ordinary course of its duties to make what is actually a policy decision by choosing between two rules, either of which might be deemed applicable to the situation presented in a pending case.

But if and when a court in construing and applying a constitutional provision or a statute becomes a policy maker, it may leave construction behind and exercise functions which are essentially legislative in character, whether they serve in practical effect as a constitutional amendment or as an amendment of a statute. It is here that we feel the greatest concern, and it is here that we think the greatest restraint is called for. There is nothing new in urging judicial self-restraint, though there may be, and we think there is, new need to urge it.

CONCLUSIONS OF THE REPORT OF THE COMMITTEE ON FEDERAL-STATE RELATIONSHIPS AS AFFECTED BY JUDICIAL DECISIONS

Conclusions of the Report

This long review, though far from exhaustive, shows some of the uncertainties as to the distribution of power which are probably inevitable in a Federal system of government. It also shows, on the whole, a continuing and, we think, an accelerating trend towards increasing power of the national government and correspondingly contracted power of the State governments. Much of this is doubtless due to the fact that many matters which were once mainly of local concern are now parts of larger matters which are of national concern. Much of this stems from the doctrine of a strong, central government and of the plenitude of national power within broad limits of the national government which was expounded and established by Chief Justice Marshall and his colleagues, though some of the modern extensions may and do seem to us to go to extremes. Much, however, comes from the extent of the control over the action of the States which the Supreme Court exercises under its views of the Fourteenth Amendment.

We believe that strong State and local governments are essential to the effective functioning of the American system of Federal government; that they should not be sacrificed needlessly to leveling, and sometimes deadening, uniformity; and that in the interest of active, citizen participation in self-government—the foundation of our democracy—they should be sustained and strengthened.

As long as this country continues to be a developing country and as long as the conditions under which we live continue to change, there will always be problems of the allocation of power depending upon whether certain matters should be regarded as primarily of national concern or as primarily of local concern. These adjustments can hardly be effected without some friction. How much friction will develop depends in part upon the wisdom of those empowered to alter the boundaries and in part upon the speed with which such changes are effected. Of course, the question of speed really involves the exercise of judgment and the use of wisdom, so that the two things are really the same in substance.

We are now concerned specifically with the effect of judicial decisions upon the relations between the federal government and the state governments. Here we think that the over-all tendency of decisions of the Supreme Court over the last 25 years or more has

been to press the extension of federal power and to press it rapidly. There have been, of course, and still are, very considerable differences within the Court on these matters, and there has been quite recently a growing recognition of the fact that our government is still a federal government and that the historic line which experience seems to justify between matters primarily of national concern and matters primarily of local concern should not be hastily or lightly obliterated. A number of justices have repeatedly demonstrated their awareness of problems of federalism and their recognition that federalism is still a living part of our system of government.

The extent to which the Supreme Court assumes the function of policy-maker is also of concern to us in the conduct of our judicial business. We realize that in the course of American history the Supreme Court has frequently—one might, indeed, say customarily—exercised policy-making powers going far beyond those involved, say, in making a selection between competing rules of law.

We believe that in the fields with which we are concerned, and as to which we feel entitled to speak, the Supreme Court too often has tended to adopt the role of policy-maker without proper judicial restraint. We feel this is particularly the case in both of the great fields we have discussed—namely, the extent and extension of the federal power, and the supervision of state action by the Supreme Court by virtue of the Fourteenth Amendment. In the light of the immense power of the Supreme Court and its practical nonreviewability in most instances no more important obligation rests upon it, in our view, than that of careful moderation in the exercise of its policy-making role.

We are not alone in our view that the Court, in many cases arising under the Fourteenth Amendment, has assumed what seem to us primarily legislative powers. (See Judge Learned Hand on the Bill of Rights.) We do not believe that either the framers of the original Constitution or the possibly somewhat less gifted draftsmen of the Fourteenth Amendment ever contemplated that the Supreme Court would, or should, have the almost unlimited policy-making powers which it now exercises. It is strange, indeed, to reflect that under a constitution which provides for a system of checks and balances and of distribution of power between national and state governments one branch of one government—the Supreme Court—should attain the immense, and in many respects, dominant, power which it now wields.

We believe that the great principle of distribution of powers among the various branches of government and between levels of government has vitality today and is still the crucial base of our democracy. We further believe that in construing and applying

the Constitution and laws made in pursuance thereof, this principle of the diversion of power based upon whether a matter is primarily of national or of local concern should not be lost sight of or ignored, especially in fields which bear upon the meaning of a constitutional or statutory provision, or the validity of state action presented for review. For, with due allowance for the changed conditions under which it may or must operate, the principle is as worthy of our consideration today as it was of the consideration of the great men who met in 1787 to establish our nation as a nation.

It has long been an American boast that we have a government of laws and not of men. We believe that any study of recent decisions of the Supreme Court will raise at least considerable doubt as to the validity of that boast. We find first that in constitutional cases unanimous decisions are comparative rarities and that multiple opinions, concurring or dissenting, are common occurrences. We find next that divisions in result on a 5 to 4 basis are quite frequent. We find further that on some occasions a majority of the Court cannot be mustered in support of any one opinion and that the result of a given case may come from the divergent views of individual Justices who happen to unite on one outcome or the other of the case before the Court.

We further find that the Court does not accord finality to its own determinations of constitutional questions, or for that matter of others. We concede that a slavish adherence to *stare decisis* could at times have unfortunate consequences; but it seems strange that under a constitutional doctrine which requires all others to recognize the Supreme Court's rulings on constitutional questions as binding adjudications of the meaning and application of the Constitution, the Court itself has so frequently overturned its own decisions thereon, after the lapse of periods varying from one year to seventy-five, or even ninety-five years. (See the tables appended to Mr. Justice Douglas' address on *Stare Decisis*, 49 Columbia Law Review 735, 756-758.) The Constitution expressly sets up its own procedures for amendment, slow or cumbersome though they may be.

These frequent differences and occasional overrulings of prior decisions in constitutional cases cause us grave concern as to whether individual views of the members of the court as from time to time constituted, or of a majority thereof, as to what is wise or desirable do not unconsciously override a more dispassionate consideration of what is or is not constitutionally warranted. We believe that the latter is the correct approach, and we have no doubt that every member of the Supreme Court intends to adhere to that approach, and believes that he does so. It is our earnest hope which we respectfully express, that that great Court exercise to the full its power of judicial self-restraint by adhering firmly to its

tremendous, strictly judicial powers and by eschewing, so far as possible, the exercise of essentially legislative powers when it is called upon to decide questions involving the validity of state action, whether it deems such action wise or unwise. The value of our system of federalism, and of local self-government in local matters which it embodies, should be kept firmly in mind, as we believe it was by those who framed our Constitution.

At times the Supreme Court manifests, or seems to manifest, an impatience with the slow workings of our federal system. That impatience may extend to an unwillingness to wait for Congress to make clear its intention to exercise the powers conferred upon it under the Constitution, or the extent to which it undertakes to exercise them, and it may extend to the slow processes of amending the Constitution which that instrument provides. The words of Elihu Root on the opposite side of the problem, asserted at a time when demands were current for recall of judges and Judicial decisions, bear repeating: "If the people of our country yield to impatience which would destroy the system that alone makes effective these great impersonal rules and preserves our constitutional government, rather than endure the temporary inconvenience of pursuing regulated methods of changing the law, we shall not be reforming. We shall not be making progress, but shall be exhibiting that lack of self-control which enables great bodies of men to abide the slow process of orderly government rather than to break down the barriers of order when they are struck by the impulse of the moment." (Quoted in 31 *Boston University Law Review* 43.)

We believe that what Mr. Root said is sound doctrine to be followed towards the Constitution, the Supreme Court and its interpretation of the Constitution. Surely, it is no less incumbent upon the Supreme Court, on its part, to be equally restrained and to be as sure as is humanly possible that it is adhering to the fundamentals of the Constitution with regard to the distribution of powers and the separation of powers, and with regard to the limitations of judicial power which are implicit in such separation and distribution, and that it is not merely giving effect to what it may deem desirable.

We may expect the question as to what can be accomplished by the report of this committee or by resolutions adopted in conformity with it. Most certainly some will say that nothing expressed here would deter a member or group of members of an independent judiciary from pursuing a planned course. Let us grant that this may be true. The value of a firm statement by us lies in the fact that we speak as members of all the state appellate courts with a background of many years' experience in the determination of thousands of cases of all kinds. Surely there are those who will respect a declaration of what we believe. And it just could be true

that our statement might serve as an encouragement to those members of an independent judiciary who now or in the future may in their conscience adhere to views more consistent with our own.

Respectfully submitted,

FREDERICK W. BRUNE,
Chief Judge of Maryland, Chairman.

ALBERT CONWAY,
Chief Judge of New York.

JOHN R. DETHMERS,
Chief Justice of Michigan.

WILLIAM H. DUCKWORTH,
Chief Justice of Georgia.

JOHN E. HICKMAN,
Chief Justice of Texas.

JOHN E. MARTIN,
Chief Justice of Wisconsin.

MARTIN A. NELSON,
Associate Justice of Minnesota.

WILLIAM C. PERRY,
Chief Justice of Oregon.

TAYLOR H. STUKES,
Chief Justice of South Carolina.

RAYMOND S. WILKINS,
Chief Justice of Massachusetts.

SUGGESTIVE REMINDERS OF SOME EARLIER DISCUSSIONS IN THE BACKGROUND OF THE REPORT OF THE CHIEF JUSTICES

WALTER ARMSTRONG'S PREDICTION IN 1941

In 1941 at a meeting of the Illinois Bar, the late Walter Armstrong, then President of the American Bar Association, delivered an address on "The Increasing Importance of State Supreme Courts" which was printed in the A. B. A. Journal for January 1942 and reprinted in 27 Mass. Law Quarterly No. 2, February 1942. In the course of the address he said:

> "A great state supreme court, construing the Federal Constitution, in a case where there is no binding precedent, will not merely engage in a guessing contest as to the view the Supreme Court of the United States will take, but will arrive at its independent conclusion and assert its own views. If this feeling of independence comes to pervade the state courts to as full an extent as I believe it will, we have a right to expect from them great opinions expounding the Federal Constitution—opinions that will challenge the attention of the nation and materially influence the development of constitutional law."

So far as we are aware, no opinion such as he described has appeared from any one court, but we now have the impressive opinions of 35 chief justices and one associate justice of State Supreme Courts in the report and resolution referred to above which, because of their constitutional position and its personal and professional

responsibilities, has attracted the attention of the nation. That is why it is, and in our opinion, will remain, an historic document in our Constitutional history whether we agree with it or parts of it or not.

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"THE RIGHT OF THE FUTURE"

The late Mr. Justice Jackson in his book on "The Struggle for Judicial Supremacy" written while he was Solicitor General in 1941, said in his preface:

> "No doubt another day will find one of its tasks to be correction of mistakes that time will reveal in this structure in which we now take pride. Our innovations will then have become the established order, and only fanatics underestimate the power of an established order. As one who knows well the workmen and the work of this generation, I bespeak the right of the future to undo our work when it no longer serves acceptably. The precedents of this period should receive only the respect due to the deeds of men who with earnest heart and troubled mind have sought gropingly but honestly for what was best for their day."

* * * *

A PREFACE BY JAMES B. THAYER IN 1895

The remarks of Mr. Justice Jackson quoted above, and the latter part of Dean Griswold's thoughtful address (herein after printed) reminded us of Prof. Thayer's preface to his two volume Case Book on Constitutional Law. As one of his students, beginning shortly after the Case Book appeared in 1895, we have always regarded Thayer as, perhaps, the greatest of American teachers of this subject in the scope of his thinking and his insistence that his students should search for and separate the exact point of decision from the frequent rambling and loose reasoning in the opinions. We think the following extract from his preface should be recalled to the attention of the profession.

The Preface

"I am led to hope that the completed work may help to promote a deeper, more systematic, and exacter study of this most interesting and important subject, too much neglected by the profession. It appears to me that what scientific men call the *genetic* method of study, which allows one to see the topic grow and develop under his eye, . . . is one peculiarly suited to the subject of Constitutional Law. For, while this is a body of *law*,—of law in a strict sense, as distinguished from constitutional history, politics, or literature, since it deals with the principles and rules which courts apply in deciding litigated cases; and while, therefore, it is an exact and technical subject; yet it has that quality which Phillipps, the writer on Evidence, alluded to when he said, in speaking of the State Trials, that 'The study of the law is ennobled by an alliance with history.' The study of Constitutional Law is allied not merely with history,

but with statecraft, and with the political problems of our great and complex national life.

"In this wide and novel field of labor our judges have been pioneers. There have been men among them, like Marshall, Shaw, and Ruffin, who were sensible of the true nature of their work and of the large method of treatment which it required, who perceived that our constitutions had made them, in a limited and secondary way, but yet a real one, coadjutors with the other departments in the business of government; but many have fallen short of the requirements of so great a function. Even under the most favorable circumstances, in dealing with such a subject as this, results must often be tentative and temporary. Views that seem adequate at the time, are announced, applied, and developed; and yet, by and by, almost unperceived, they melt away in the light of later experience, and other doctrines take their place.

"Nothing else can bring home to a student the existence and the nature of this process, the large scope of the questions presented, and the true limitations of the legal principles that govern them, with anything like the freshness, precision, and force, and I might add also the fascination, which accompany the orderly tracing of these things in the cases."

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THE JUDICIAL FUNCTION

The magazine section of the New York Times for Sunday, June 18, 1944 contained a considerate study of the activities of the Court by the late Professor Thomas Reed Powell (certainly no slave of "conservative" tradition). This article contained a thoughtful passage which cannot be ignored as coming from a "cloistered" professor of theory. He was not a "cloistered" individual and he knew what was going on in the minds of the bar and the judges of the lower courts. In regard to the differing approach to law of the differing judges then frequently disagreeing with each other he pointed out that:

> "The contrast is not one between competence and incompetence. Both rank high in intellectual competence. Nor is the contrast one between liberalism and conservatism in realms outside conceptions of the proper scope of the judicial function. The chief underlying difference is in conceptions of that function. Again roughly one may contrast a leaning for getting the result in the particular case as if it were a legislative choice with a leaning to respect the outlines and many of the details of an established legal system."

Not many years ago much was said by critics of "the old court," about need for "judicial restraint" in connection with the exercise of the Court's constitutional function. Prof. Powell's discussion was quoted in an article in the A. B. A. Journal for September 1944. It was then stated that:

"We may not always be in sympathy with the decisions handed down by the Court, but, evidently, we can be sure that the justices are giving sincere expression to their individual beliefs, ungoverned by any common political bias."

But the question was asked, "are not some of the justices unconsciously creating bigger and bigger fictions in their minds as to their 'conception of the judicial function' to which Professor Powell refers?"

* * * *

THE TENTH AMENDMENT

We realize, of course, that the 10th Amendment in the course of years has been more and more interpreted into a reminder of a constitutional hope rather than a constitutional rule of law; but it is still there, it had a history and a purpose; it was regarded in Massachusetts, at least, as a part of the Federal Bill of Rights and it is today a constitutional reminder not to be forgotten by the Federal Courts or by the other branches of the government. It is, therefore, still a persuasive element of the power and duty of "judicial self-restraint" because it was a powerful influence with the "Founding Fathers" of the ratifying conventions and the public in securing ratification of the Constitution. It is well for us, especially in Massachusetts, to keep in mind the story of how and why it was adopted.

Pennsylvania and several other states had ratified, but others including Virginia and New York, had not acted when the Massachusetts Convention met early in January, 1788, at what became a turning point in the story. Madison wrote Washington on January 20, 1788, that he thought the decision of Massachusetts would invoke the result in New York and that an adverse decision might upset the result in Pennsylvania. No partial, or conditional, approval was possible, for it was generally agreed that unless unconditional ratification took place there was little hope of agreement as to a central government. When the Massachusetts Convention (of more than 300) met, there was an obvious majority in opposition because there was no bill of rights, and because they feared a central government at a distance for the same reasons that they had objected to distant government from London under King George III. They were conscious of the fact that Thomas Allen and the Berkshire men had prevented the Massachusetts Court from sitting in the county for six years until they had a state constitution to protect them in 1780 (see A.B.A. Journal for March, 1936). They were conscious of the fact that Chief Justice William Cushing (who cannot be ignored in our Constitutional history, see 43 Mass. Law Quart. No. 2, March, 1958), the second appointee to the Supreme Court of the United States, the most experienced judge on the first court for almost 30 years before Marshall became a judge, had abolished slavery in Massachusetts by a charge to a jury under the first article of the Massachusetts Bill of Rights in 1783—five years before the meeting of

the ratifying convention of which he was the vice president and presiding officer during most of the sessions in the absence of Hancock.

John Hancock, the popular Governor, was president of the convention, but, for a time, could not preside because he had the gout. Finally, after about three weeks of debate, with the opposition still in the majority, the plan of proposing amendments to the first Congress to accompany unconditional ratification was thought out. The proposals were drafted, and submitted to and by Hancock, who, whatever his faults, had had the political courage to be the first signer of the great Declaration. He took his seat as presiding officer, submitted the proposals, and carried ratification by 19 votes.

The first of these proposals and the remarks of Samuel Adams in support of it, are pertinent. It is generally agreed that the support of Samuel Adams was essential to ratification. On February 1st, he gave that support to the proposals of Hancock and in the course of his speech said:

> "Your Excellency's first proposition is, 'that it be explicitly declared, that all powers not expressly delegated to Congress, are reserved to the several states, to be by them exercised.' This appears to my mind to be a summary of a bill of rights, which gentlemen are anxious to obtain; it removes a doubt which many have entertained respecting this matter, and gives assurance that if any law made by the Federal government shall be extended beyond the power granted by the proposed Constitution, and inconsistent with the Constitution of this State, it will be an error, and adjudged by the courts of law to be void." (See Debates of Convention of 1788, p. 233.)

The words of Adams went beyond the ultimate wording in the 10th Amendment. As Chief Justice Marshall pointed out in McCulloch v. Maryland 4 Wheat. (at p. 406) the word "expressly" (lifted from the Articles of Confederation) was omitted. The present status on paper of the Amendment is explained by Prof. Corwin in the annotated volume of the Federal Constitution recently published in 1952 by the Government Printing Office. But it should not be forgotten that constitutional law has always existed in the minds of men before it is finally reduced to writing and sometimes continues to exist after it has been written (or suggested in dicta) in a judicial opinion which may not be convincing. Our Government emerged from the history of experience and controversy and must survive or fail in the same way. Hence the need of close thinking.

Prof. Corwin's "Foreword" (pp. vii-viii), his "Introduction" (pp. ix-xxviii), and the "Historical Note" (pp. 9-15) deserve reading in the light of his statement in the "Foreword" as to "the Federal System" and "the role of governmental power in relation to private rights." He says:

> "On both these great subjects the court's thinking has altered at times—on a few occasions to such an extent as to transcend

Tennyson's idea of the law 'broadening from precedent to precedent' and to amount to something strongly resembling a juridical revolution, bloodless but not wordless."

THE DIVISION OF FUNCTIONS

The constitutional division of functions was interpreted by Madison in the forty-seventh number of *The Federalist* in the language of the New Hampshire constitution:

> . . . that the legislative, executive and judiciary powers, ought to be kept as separate from and independent of each other, *as the nature of a free government will admit; or as is consistent with that chain of connection, that binds the whole fabric of the constitution in one indissoluble bond of unity and amity.*

The application of this idea to what is done or not done calls for "judicial self-restraint," in other words what Mr. Justice Bremer once called "the wisdom of government" and wisdom is a variable intangible.

Extracts from

"THE EMPEROR'S CLOTHES—AN AMERICAN MEDLEY"

(*A. B. A. Journal*, February 1950)

"Some of the most illuminating literature as to government problems is to be found in the earlier books written for children. And in Hans Andersen's Fairy Tales, there is the story of 'The Emperor's New Clothes.'

"The Emperor was very vain about his clothes and, of course, all his courtiers were expected to admire them and did so, and his people were also expected to and did. After a while two men came and told the Emperor that they were weavers and could make for him the most wonderful clothes he had ever had.

"So he gave the men a large sum to begin work. They set up two looms and began. Wishing to know how they were getting on, the Emperor sent his best minister to see. When he saw the men working at the looms, he thought, 'I can see nothing at all—can I be so stupid? I never thought so, and I must not let any one know it. Can I be unfit for my office? No, it will never do for me to own that I could not see the stuff.'

"So he said, 'It is most elegant—both the pattern and the colors, and I shall tell the Emperor,' and he did.

"Then the Emperor went himself to see the work.

" 'Why, how's this?' he thought. 'I can see nothing. Can I be stupid? Am I not fit to be Emperor? That would be the most shocking thing that could happen to me.' So he said, 'It's very pretty, it has our most gracious approval.' All the courtiers present said, 'It's very pretty,' and the Emperor gave the two men the title of 'weavers to the imperial court.'

"Finally the weavers said that all was ready for the Emperor to wear his new clothes in a grand procession.

"The Emperor then went forth in grand procession under the splendid canopy while the people in the street, and others at their windows, all exclaimed: 'Dear me! How incomparably beautiful are the Emperor's new clothes! What a fine train he has, and how well it is cut!' No one, in short, would let his neighbor know that he saw nothing, for that would have been like declaring himself unfit for his office, whatever it might be, or, at best, extremely stupid. None of the Emperor's clothes had ever met with such universal approbation as these.

" 'But he has nothing on!' cried at length one little child.

" 'Only listen to that innocent creature,' said the father; and the child's remark was whispered from one to the other as a piece of laughable simplicity.

" 'But he has nothing on!' cried at length the whole crowd.

"This startled the Emperor, for he had an inkling that they were in the right, after all; but he thought: 'I must, nevertheless, face it out till the end, and go on with the procession.'

"And the lords in waiting went on marching as stiffly as ever, carrying the train that did not exist."

The article then continued.

"Is there a moral for us in this story? If so, what is it? 'Tis an old saw, children and fooles speak true'; and, in the Eighth Psalm, we find the line, 'Out of the mouth of babes and sucklings hast thou ordained strength.'

"Are we really thinking, or are we drifting while admiring the seductive slogans and catchwords of idealists?

"Granted that we should 'hitch our wagon to a star.' We did that in the eighteenth century and earlier.

"How many stars can we hitch our wagon to without losing the wagon by having it pulled apart? Just how wonderful are the expensive new 'clothes' which the Republic is to wear? As stated in the preambles of the Federal and of the Massachusetts Constitutions, our 'republic' was founded for 'posterity,' which means children. Are those children to see, too late, that 'the emperor has no clothes'? [Or perhaps more accurately, not enough?]

"Is the Federal Government reversing history and its constitutional character as one of delegated powers, and becoming the practical source of all power without our knowing it?

"If so, is this an inevitable development of history? Does it mean that our constitutional balanced government of states and nation is an American dream that Americans are no longer capable of keeping and operating? Or is it the result of neglect and the consequent creeping paralysis and erosion of American thought and the accretion of centralized power in Washington?

"We do not attempt to answer all these questions, but they seem provocative of thought." [Judge Learned Hand seems to have been thinking about them.]

In *The Federalist*, No. LI (February 8, 1788), we were told that "In framing a government, which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed: and in the next place, oblige it to control itself."

It is this last clause with which the report of the chief justices is concerned—as Chief Justice Dethmers points out, "to alert the public to trends and developments of tremendous moment to the people." In other words to emphasize the fact that because of our dual system of government "judicial self-restraint" is the method contemplated by the Constitution for the judicial branch "to control itself." "Despite certain newspaper headlines to the contrary" he points out that the report is not an attack on the Supreme Court.

"It contains no applause for suggestions on the political front that the Court be stripped by Congressional action of any of its traditional powers. . . . The Conference report would have none of this."

But while the A.B.A. House of Delegates voted, almost unanimously, against the Jenner bill (see 43 Mass. Law Quarterly No. 1, March, 1958), some form of it had a close call in the Senate recently.

CALM, DETACHED, THINKING NEEDED

It is because misunderstanding by headlines, snapshot comments or slanted emphasis has already appeared that we have printed this material which seems to us pertinent so that Massachusetts lawyers, at least, and such of our readers as are in other states, may understand better the temperate nature and purpose of the report and meet its challenge to balanced professional thinking.*

F. W. GRINNELL

THE APPROACH OF THE 100th ANNIVERSARY OF THE SUPERIOR COURT—1859-1959

The Superior Court was created in 1859 taking the place of the Courts of Common Pleas and the Superior Court of Suffolk County, following a report of a joint legislative Committee (H. 120 of 1859). The Court has appointed a Committee of which Hon. Paul Kirk is Chairman to arrange for appropriate observance of the Anniversary.

Alan Dimond is engaged in digging up generally unknown or forgotten information with a view to preparing an account of the history of the Court.

For two new rules of the Superior Court see p. 112. F. W. G.

DEAN GRISWOLD'S ADDRESS

As we were going to press this thoughtful address, before the California bar on October 9th, appeared. As, in our opinion, every American lawyer should have the convenient opportunity to read and ponder it, we have printed it with his permission, in addition to the other material. F. W. G.

* In this connection I suggest reading a remarkably well balanced and, I believe, accurate little volume of 60 pages (especially pp. 40-60)—The Boston University Lectures on "Consensus and Continuity, 1776-1787" by Benjamin F. Wright, President of Smith College, published in 1958 by the Boston University Press.

DEAN GRISWOLD'S "MORRISON LECTURE"

(Delivered before the State Bar of California at Coronado, California, on Thursday, October 9, 1958, by Erwin N. Griswold.)

I

One need hardly tell a Californian that this country has had a great history, and that it has for a hundred and seventy-five years filled a unique place in the world. "The American experiment" has held the attention of men, both within and outside America. It has been a great venture, phenomenally successful in many ways. Yet, perhaps because of its success, we are at times in danger of forgetting the lessons developed from our own experience.

Once upon a time there was in the eastern part of this Continent a loose federation of weak states operating under the Articles of Confederation. This was a brave attempt to make a viable nation without any really effective central government. It took only a few years to satisfy every one that it would not work. One of the great defects of that unhappy government was the lack of a federal judiciary, with power to make final decisions on questions arising between the states, and between the states and the national government. This was clearly pointed out by Hamilton in Number XXII of the Federalist, while the Constitution of the United States was under consideration. "A circumstance which crowns the defects of the Confederation remains yet to be mentioned," he wrote "—the want of a judiciary power. Laws are a dead letter without courts to expound and define their true meaning and operation. . . . To avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatories, all nations have found it necessary to establish one court paramount to the rest, possessing a general superintendence, and authorized to settle and declare in the last resort a uniform rule of civil justice."

So we started out a new country, with a single Supreme Court, with final power to construe the provisions of the Federal Constitution, which, by its own terms "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in Constitution or Laws of State to the Contrary notwithstanding." And the country prospered, and became a nation. Many things contributed to this, but any one who examines American history knows that the Supreme Court played an important part through its work in interpreting and applying the Constitution.

After a little more than seventy years had passed, we had a Civil War. There were issues in that war. The war was a ghastly business, and it is a mockery to say that it did not bring the issues to a conclusion. As a direct result of the war, we adopted a substantial change in our Constitution—the Thirteenth, Fourteenth and Fifteenth Amendments. America was born in a spirit of egalitarianism. "We hold these truths to be self-evident, that all men are

created equal, . . ." Need we be reminded that Americans really believed these doctrines—that this was the essence of the American experiment? And through the years, we have progressed steadily in the realization of this objective. The original Constitution did much. The Bill of Rights added measurably to the protection of the individual against the central government. The constitutional Amendments arising out of the ashes of the Civil War terminated the abomination of slavery, and extended the rights of the individual —all individuals, without regard to race or color—against the states, and provided explicity that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." This was not a mere legalism, or empty pretense. It was a clear expression of the conscience of America, directly in accord with the stream of American tradition and aspiration. We have not always lived up to our professions. But I thought we tried.

Through all the years the Supreme Court has played a great role in resolving issues between the nation and the states, and between individuals and governmental power. Since the function of such a tribunal is to resolve issues, it is inevitable that it should proceed in the midst of tensions. Since some one must lose whenever an issue is resolved, it is inevitable that there should be disappointment with every decision. But it is of the essence of orderly government that such decisions should be accepted. I need not tell a group of lawyers that down the other road lies only chaos and calamity.

II

Over the past three or four years, there has been great controversy about the Supreme Court. This has not been unprecedented, for the Court is inevitably and inherently subject to controversy. Marbury v. Madison; Jefferson and Marshall; the Bank of the United States; the Dred Scott case; many cases in the post Civil War period; the income tax decision of 1894; Theodore Roosevelt's movement for the recall of judicial decisions; the "economic decisions" of the 1920's; the second Roosevelt's ill-starred court-packing plan—all of these, and more, can serve to bring to mind the fact that some one has been unhappy about the Supreme Court during most of our history. How could it be otherwise?

This is especially true when the issues which the Court must decide have deep emotional overtones. But the very function of a Court, especially a constitutional court of last resort, is to separate the constitutional and legal issues from the tentacles of emotions and to decide the questions as free from emotion as is humanly possible. Any lawyer knows how hard that is to do. It does not take much looking around, though, to make it plain that the Supreme Court does this better—as it should—than any other agency of government, state or federal.

Much of the criticism of the Supreme Court in recent years can be traced directly or indirectly to the segregation decisions of 1954

and 1955. It is easy—if you are a white adult—to wish that that problem had never arisen. I dare say that the Justices of the Supreme Court, as individuals, would be quite content if it had never arisen. We as lawyers know that the Court did not seek the problem, that it did not reach out to intermeddle in a field where it had no business, that, indeed, it only did its duty, which is to decide, according to the oaths and consciences of the individual Justices, in accordance with the law as they understand the law, the cases which are brought before them. To say that there was "usurpation" in this, or that the Court was "legislating" in reaching its decision, is sheer sophistry, if not hypocrisy. One need not agree with the decision, though I find no rational way to disagree. After all, what does "equal protection of the law" mean if not *equal* protection? Suppose, just for a moment, that the Court had found some way to decide this question the other way. What would that have done to the American experiment, to the American ideal? Would it, in the middle of the twentieth century, still have been the America that we love? Hard as the present course is, is it not easier, and surely more American, more consonant with what we have written into our Constitution, and more lawyer-like, than the alternative?

III

The recent criticism of the Supreme Court began in full force in March, 1956, when 19 Senators and 77 members of the House of Representatives, all from southern states, presented what they called a "Declaration of Constitutional Principles." This referred to "The unwarranted decision of the Supreme Court in the public school cases," and stated that the decision was "a clear abuse of judicial power." It said that the Supreme Court was "undertaking to legislate" and "substituted their personal political and social ideas for the established law of the land." And the signers pledged themselves "to use all lawful means to bring about a reversal of this decision which is contrary to the Constitution." Of course no one questions the right of these men to hold and to express their views. Yet this statement gives no recognition to the function of the Court, to the doctrine that had developed in it, over a period of many years, with the participation "of thirty or more different Justices," as John P. Frank has pointed out (p. 213) in his recent book called "Marble Palace." Mr. Frank adds that (p. 284) "Those persons . . . who hope that this problem may be solved by the simple expedient of persuading the Constitution either to lie down or to go away are doomed to disappointment."

This statement by the Congressmen and Senators opened the door to a flood of denunciation of the Supreme Court which was far less restrained in substance and in tone. The situation became a field day for southern politicians, great and small. A number of the legislatures of southern states adopted resolutions denouncing the Supreme Court and its members in rather sweeping terms. Among these, I may mention a Resolution Adopted by the General Assembly

of Georgia on February 22, 1957, "Requesting Impeachment of Six Members of the United States Supreme Court." This is duly printed in the Statutes of Georgia—1 Georgia Laws, 1957, pages 553-568—and copies of it were broadcast throughout the country by an agency of the State of Georgia, which is called the Georgia Commission on Education. As distributed, this had on the cover a color reproduction of the flag of Georgia, which is mostly composed of the Confederate Flag. The extravagant language of this resolution, which among other things charges six members of the Supreme Court with "undertaking by judicial decrees to carry out communist policies" must be seen to be believed.

I could go on with much more of this. It does not make one very proud of the responsibility of supposedly responsible government officers. But this is not all. A year or so ago, there was published a pamphlet entitled "Nine Men against America," and this has now been expanded into a book. The author of this pamphlet, and book, is Rosalie M. Gordon, of whose qualifications for constructive constitutional comment I am uninformed. Then there is a strange document entitled "The Supreme Court—an Instrument of Communist Global Conquest," put out by something or somebody which calls itself SPX Research Associates. This was even printed by the Government Printing Office, and published as a part of the Hearings before the Senate Judiciary Committee on the Jenner and Butler Bills, designed to limit the appellate jurisdiction of the United States Supreme Court. Apparently this was part of a plan to get cheap printing for this report. When that did not work, it has been sent out in mimeographed form. Several copies have come to my desk. Indeed, my mail has a steady stream of this sort of crackpot literature, a considerable part of which, I may say, emanates from various places in Southern California. Some of this is put out by the Christian Nationalist Crusade, which strikes me as one of the more un-Christian organizations of my experience.

I do not want to belabor this aspect of the matter further. I have not attempted to give a complete survey of this sort of criticism of the Supreme Court. Frankly, I haven't the stomach for it; and it would serve no useful purpose. I want to recognize, too, that just because much of the criticism of the Supreme Court in recent years is irresponsible and reprehensible, it does not follow that the Court is not subject to proper criticism. But we should nevertheless be on guard. It is plain enough that a considerable part of the attacks on the Court come from people who are reacting because there is interference in having their own way, and from another group of people who have no idea what America is all about. With such a hue and cry being raised, one should be very careful that he does not join it, and that he does not create the impression that he is joining it. This is an especial responsibility for lawyers, who should be expected to have an understanding of the actual issues involved in these matters, and to whom the public can rightly look for sound and thoughtful leadership on questions of such fundamental public importance.

There is one further aspect of this matter to which I should make reference before I leave it. Quite seriously I say that there is in all probability nothing that has happened within the past ten years which has so played into the hands of the communists as the reaction to the Supreme Court's decision in the School cases. Any one who has been abroad knows the harm that this has done to America's pretensions of freedom and leadership. During this past summer I had the opportunity to spend several weeks in South Africa. News from Little Rock is given at least as much prominence there as in the United States. There are 180,000,000 people in Africa, and 400,000,000 in India, and 600,000,000 in China, not to mention Indonesia, and Japan, and the Philippines, and Malaya, and the Near East. How can we expect to convince them that our way of life deserves their support when we conduct ourselves as we have been doing? Here again we may find that the consequences of our actions on the minds of men may be of even greater practical importance than developments in the field of science. This is an aspect of this matter to which we should all give deep and thoughtful consideration.

Governor Faubus will no doubt have a place in our national chronicles. As my colleague, Professor Paul A. Freund, has pointed out, though, he "is not likely to be identified in history with Abraham Lincoln." Freund, "Storm over the Supreme Court," 21 Modern L. Rev. 345, 357 (1958).

IV

Not all of the criticism of the Supreme Court has arisen out of the School cases. There have been some other decisions, chiefly in the field of Civil Liberties, which have evoked considerable opposition. This, too, is an area charged with emotion, though, for the most part, different people and different emotions are involved. One who had close familiarity with American history might expect that there would be deep feeling here in favor of the protection of the rights of individuals. And of course there is. But there has also been, in recent years, a great and legitimate concern about the threat of communism. In such an area it is hard to keep cool and thoughtful. It may be hoped that we will develop better perspective with the passage of time.

Quite a bit of the criticism in this area, it seems to me, has been based on plain misunderstanding. For example, a year ago there was great excitement about the *Jenks* case, in which the Court held that when a witness testifies who has previously given a statement to the F.B.I., that statement must be made available to counsel for the defendant. Really, this seems rather elementary. How could we have a decent system of criminal trials on any other basis? Yet this decision was attacked on the ground that it opened "the FBI files to the communists, to say nothing of assorted crooks, grafters, narcotics peddlers, etc." Nine Men against America (1957 18. Actually, it did not do that at all, as can be seen by any one who will take the trouble to read it. There was an extravagant dissenting

opinion in the case, which gave rise to some misunderstanding. And the then Attorney General went before both Houses of Congress and said that the government was confronted with a "grave emergency," and sought a statute which Congress passed. Whether there was such an emergency in fact seems rather doubtful, even though some lower courts may have misapplied the decision. The witness in the *Jenks* case was Harvey Matusow. Suppose your client was being convicted on Harvey Matusow's testimony, and you knew that he had made a previous statement to the F.B.I. Wouldn't you want to see that statement? Wouldn't you regard it as highly unfair and improper if you were not allowed to see the statement? Is there any lawyer who can seriously say that the Supreme Court did anything in the *Jenks* case except its plain duty? Lawyers, especially trial lawyers, should be commending the Court for this decision.

Another case which has caused concern, especially here in California, is the *Konigsberg* case, in which your own Supreme Court was reversed on a matter of admission to the bar. That decision troubles me, too. Nevertheless, as my colleague Professor Archibald Cox pointed out in a speech he gave in Los Angeles at the time of the American Bar Association Convention there last August, this decision should not be read too broadly. One of the first things that a law student learns in Law School is that an opinion must be taken in the light of the facts before the Court, and that its significance depends on the actual decision on those facts, and on nothing more. As Professor Cox observed in his speech, the *Konigsberg* case shows that the Supreme Court "is concerned that a man should not be denied admission to the bar because of radical political or economic views," and that he should not be put to a special burden of proof because of such views. There is a clear distinction, which I am sure the Court would recognize, between radical political and economic views, on the one hand, and true subversion, on the other. The ranks of honored lawyers, throughout the centuries, in this country and elsewhere, have included people who challenged the status quo, as a matter of principle or on behalf of a client. Moreover, as Professor Cox likewise pointed out, the Court is concerned here, as in other fields of the law, "lest what appear to be findings of fact should mask the application of a rule of law" which is inconsistent with proper freedom in seeking admission to the bar.

As I have indicated, I do not think that the *Konigsberg* opinions are very satisfactory. Yet I have considerable confidence that experience will show that the conclusion reached is not only one that we can live with but is one that we will come to accept. The subsequent action of the Court in a case from Oregon—*In re Patterson*, 356 U.S. 947 (1958)—seems to confirm this view.

Finally, I would like to make reference to another decision as to which it seems to me that there has been great misunderstanding, based very largely on purely emotional grounds. This is the decision in *Pennsylvania* v. *Nelson*, 350 U.S. 497 (1956), where the Court held that the adoption by Congress of the Smith Act had

superseded state statutes in the field of subversion. Actually, there is really nothing novel or startling in this decision. The same general conclusion has been reached before in literally hundreds of cases. Reference is rarely made to the point actually decided in the *Nelson* case, which was that the Commonwealth of Pennsylvania could not maintain a prosecution for subversion against the *Federal* government, after Congress had provided for such prosecutions in the Smith Act. Why should a State prosecute for a conspiracy against the United States, especially when Congress has made provision for prosecution in such cases by Federal authorities and in the Federal Courts? Such conspiracies have interstate ramifications, and are almost surely in more experienced and better informed hands when they are handled by Federal authorities. Moreover, in the *Nelson* case, the Supreme Court affirmed a decision of the Pennsylvania Supreme Court. This was no novel doctrine.

There have been moves in Congress to abolish the whole doctrine that state laws are superseded when Congress has passed a valid statute in the area. This is really throwing out the baby with the bath. The passage of such a statute would upset the federal-state balance in many areas, and would go far to Balkanize the United States. More than two years have passed since the *Nelson* case was decided, and there is no evidence that I know of that it has done any harm of any sort. If State officers have information of subversion against the United States, there is no reason to think that it will not get full attention from the F.B.I. and other agencies of the Federal Government. Why should it be the responsibility of the States to prosecute for offences against the United States anyway?

V

What I have said so far seems to me to be relevant and appropriate in considering this subject. However, it should surely be recognized that not all criticisms of the Supreme Court in recent years can be dismissed on the ground that they are based primarily on emotional grounds or on misunderstanding. There are a number of persons of eminence and understanding who may be called, in the words of Professor Philip B. Kurland of the University of Chicago Law School, the "Literate Critics" of the Supreme Court.

First and foremost among these, of course, is Judge Learned Hand. Last February, he gave the Oliver Wendell Holmes lectures at the Harvard Law School, on "The Bill of Rights." These have been interpreted by some as a criticism of the Supreme Court, and perhaps they are. They are highly literate, fully considered, carefully phrased—and their actual message is far from clear to me. Judge Hand's words are always carefully guarded, as is surely appropriate. If what he is saying is "Go slow. Be careful. Take it easy. There are other instruments of government."—then he is surely sound and wise. If he is saying more, as some seem to think he is, even to the extent that the courts should not move at all in the field of the Bill of Rights, but should leave this entirely to legis-

lative hands, then I can only say that this does not seem to me to be consistent with our best history, nor is it what Judge Hand has done himself when he has spoken as a judge in actual cases. In the absence of a clearer statement, I do not myself think that this is what he means. He does say that the Supreme Court should not undertake to act as a third house of the legislature, and there can be no disagreement with that. And insofar as he says that our legislative bodies themselves have a great responsibility in the field of civil liberties which they should exercise more regularly and carefully, one may likewise agree. But a legislative body is not a good place for the protection of individual rights—strange as that observation may seem. There is ordinarily no concrete specific case before the legislative body. It legislates in general terms, on a broad issue, and rightly enough, with the general public interest primarily in view. However, in the courts, there is an individual claiming protection, and presenting the concrete facts of an actual case. Moreover, the action against which the individual is seeking protection may be that of an executive or administrative officer who is seeking to apply the law in a way that the legislature could hardly have foreseen. Even with the greatest of responsibility on the part of the legislature, there is ample scope for the proper functioning of the courts in this field. But the courts should here, as everywhere else, be restrained and careful. For his emphasis on this important point, we can be grateful to Judge Hand.

Another document to which careful and respectful attention must be given is the Declaration signed by the Chief Justices of the Supreme Courts of thirty-six of the States at their annual Conference held in Los Angeles last August. These are responsible officers, charged with important duties under the Federal and State Constitutions. Of course, when in convention assembled, they do not speak ex cathedra. As was made plain by the judges of the Supreme Court of Michigan, they did not speak for their courts. But what they said is entitled to our careful consideration.

One may regret exceedingly the timing of their statement. For this reason, I was sorry that it was issued when it was—just at the time of the latest Little Rock developments—and that it was thought wise to put it out as a sort of an encyclical. Regardless of its merits, it was inevitable that it would be seized upon by those whose criticisms of the Supreme Court have no sound foundation, and who have other interests than the proper functioning of the national judicial systems, and the distribution of power between the nation and the states.

What the Chief Justices did was to approve a report of a committee. When you read that report, you find that most of it is given to a survey of a considerable number of decisions of the Supreme Court over a period of twenty-five years or more. It discusses federal-state relationships in what, I think, may fairly be called a strongly state-centered way. For example, it refers to the General Welfare Clause, and Grants-in-Aid. Are we to understand that the

Chief Justices are suggesting that the Social Security system, and land grant colleges, are objectionable on sound legal grounds? There is an extensive discussion of the *Konigsberg* case, to which I have already made reference. There is likewise an extensive discussion of the Supreme Court's actions with respect to state administration of criminal law. We may readily grant that there is room for discussion in this field. Nevertheless, it seems to me quite clear that if the state courts had done a better job of being scrupulous in their regard for the basic elements of fair trial, and proper procedures in criminal cases, it would have been far less necessary for the Supreme Court to step into this area.

In a concluding portion, the committee report approved by the Chief Justices became less objective, it seems to me, and made some rather sweeping assertions. It says, for example, that there is "at least considerable doubt" as to whether "we have a government of laws and not of men." There is much history and philosophy behind this phrase. Of course we are governed by men. How could it be otherwise? What the phrase means is that these men control themselves by law and do not act by whim or caprice. To say that they disagree with the Supreme Court is one thing, and is surely the privilege of the Chief Justices on or off the bench. To suggest as this passage of the report does, that the Justices of the Supreme Court are willful, and unmindful of their oaths of office, seems to me unwarranted and wholly inappropriate. Considering the comfort that the Chief Justices' statement gives to our southern friends, I wish that they had not said it. I could go on with similar discussions of other passages in the concluding portion of this statement. My best judgment is that this statement will live in history as a symptom of the times and not because of its own power as a persuasive discussion of constitutional law.

I may add brief reference to several other discussions of the Supreme Court and its functions which have recently appeared. Professor Carl Brent Swisher, of Columbia, who has written a number of distinguished biographies of Supreme Court Justices, has recently published a book on "The Supreme Court in Modern Role." Professor Alpheus T. Mason, of Princeton, who has previously written biographies of Brandeis and Stone, has just published a book on "The Supreme Court from Taft to Warren." In this, he is far less than fair, in my opinion, to Chief Justice Hughes, whom I believe to have been a very great man and a very great judge. But there is other material in Professor Mason's book, which may be helpful on these problems. Finally, another book which has just been published is "Marble Palace," by John P. Frank, of Phoenix, Arizona, which gives a very illuminating review of the Court, its responsibilities, and how it functions.

VI

And now I come to the concluding portion of this lecture. Having paid my respects to a number of those who have recently engaged

in criticisms of the Supreme Court, it is only appropriate that I, too, should now throw caution to the winds, and join their ranks.

The Supreme Court in our system has unique responsibilities. Its duties are truly awesome, and it cannot escape the issues which come before it. This is truly one of the world's toughest jobs, surely one of the most difficult and important public tasks in the United States. The persons who fill these posts are not, and should not be, above criticism. But there is an obligation, especially on members of the bar, that such criticism as is made should be understanding and constructive.

In this connection, there is a difference between the judiciary in England and in the United States. In England, all of the High Court and Appellate judges have been members of one of the four Inns of Court, where they have their chambers and lunch with their fellow lawyers with more or less regularity. All of the judges spend most of their time in London, and most of the barristers are located in London. As a result the judges mingle constantly with a large number of the barristers. They are exposed to a current of comment, and indeed of criticism, of their decisions. In this way they keep abreast of the best in contemporary professional thought. Aloof as the English judges may be, this continuing contact with their professional fellows has an influence on their conceptions of the law which they apply in their decisions.

In the United States, it is quite different. The Justices of the Supreme Court sit in Washington, and have little contact with the practicing profession. The practicing lawyers here are numerous, and widely scattered over a great area in many states. There is nothing at all that can truly be called a Supreme Court bar. There is a good deal of criticism of the work of the Court in print. But the major part of this, on a professional basis, is in the Law Reviews, which in this country are written and edited by law students. Much of this comment and criticism is of excellent quality, and I believe that the students make an important contribution to professional thought. It is obvious, though, that this has a more remote impact than that which might come from continuing close contact with thoughtful and active practicing lawyers.

In this situation, there is an especial responsibility, it seems to me, on lawyers, practicing and academic, to seek to contribute to thought on these important and difficult problems. Such contributions should be, as far as possible, constructive and understanding of the Supreme Court's tasks. It does not do much good to talk about "legislating" by the Supreme Court, or "judicial tyranny," or to suggest that we have ceased to be a government of laws and not of men. These are generalities at best, and tend to be evidence of an emotional rather than an intellectual reaction. But of more significance, the Justices of the Supreme Court, all of them, are men of honor and integrity and sincerity, and attacks on these grounds can hardly be helpful. They can only leave the Justices with the feeling that the attacks are insincere, or that they are

based on a lack of understanding of the nature of the tasks which the Supreme Court is required to carry out.

First and foremost, in considering the present state of the Supreme Court, it seems to me that the bar should recognize that the Court, and each of its members, have far too much to do, and have to work far too hard and too fast, especially in view of the great complexity and importance of the issues that come before it. My colleague, Professor Henry M. Hart, has for several years followed a practice, in connection with his course on Federal Courts, of making up a pro forma summary of how the Justices must spend their time. Taking the number of hours in the day, and the working days in the year, he then tabulates the things the Justices have to do, and spreads them over the available time. All of the time is consumed by allocating an average of fifteen minutes to a petition for certiorari, one minute to a petition for rehearing, three days to the writing of a major opinion, and so on. No time allowed for reading Shakespeare or Aristotle, or even current commentary on the Supreme Court.

To an extent to which I think the bar is largely unaware, the Supreme Court is now oppressed by mere volume and complexity of its business. This has happened at various times before in the Court's history, and expedients have been developed from time to time to limit the number and character of cases which come to the Court. The last time that this was done was in 1925, now more than a third of a century ago. During that time, the population of the country has increased by sixty per cent, and the number of controversies of the sort that can come to the Supreme Court has increased even more. The Supreme Court has been able to exist by a sparing use of its certiorari power, but it has been, in recent years, only an existence. To work as hard and conscientiously as they have to, and then to be kicked around as they are, must be rather trying at times. Even more important, it seems to me that it cannot help but have an impact on the quality of their work, much as they may strive to avoid that result. Few of us can do intellectual work under constant heavy pressure as well as we can when we have some intervals for thought. And that must be especially true in a field of activity where opportunity for consideration for discussion with fellows, for maturation of thought, and for writing and rewriting, is as inherently necessary as it is in the kind of work which the Supreme Court is always having to do. The layman may think that the law is clear and simple, and well-known to those who have had legal training. The lawyer knows that the law in the hard cases is wrought out of contemplation and understanding, and is only obtained after intellectual work of the most difficult and searching kind.

So I would first propose that the organized bar establish committees to review the volume of the Court's work, and, in cooperation with the Court, to devise ways and means to reduce this, so that the Court may have ample time to consider and weigh the

tremendous questions which come before it. This will not be an easy task. Of course the Court can help with it. But the burden should not be put upon the Court. No one, not even the Supreme Court, likes to complain that its task is too heavy. But when, as is the case now, its task in sheer volume is such that it just does not have adequate time to do all of its work as it really should be done, then there is, it seems to me, a clear duty on the organized bar to step in and help with plans to reduce the Court's burdens to more manageable proportions.

One area where something could be done, for example, is with respect to ordinary tax cases. It is now some twenty years ago since your own Roger Traynor proposed that there should be a special court of appeal in tax cases. And I came along with a similar proposal a few years later. These suggestions were strongly disapproved by practicing lawyers. Yet the fact remains that the Supreme Court in a federal nation of 185,000,000 persons ought not to have to spend its time deciding ordinary tax cases. Indeed, I will even go so far as to say that the Supreme Court, hard pressed for time as it is, does not do a very good job in the intricate and specialized field of federal taxation. For instance, I may mention one of its most recent decisions in the field—*Flora* v. *United States*, 357 U.S. 63 (1958)—where the Court held that a taxpayer who had paid only part of a tax claimed to be due from him could not maintain a suit to get it back. This leads to the bizarre result that a taxpayer who pays everything he has is wholly without remedy if he cannot pay the whole tax assessed. This result was reached in the teeth of the language of the statute, and on the basis of a statement of practice which is demonstrably wrong. I venture the thought that this was a result which would not have been reached if the court had had more time for the consideration of the case. But, as things are, tax cases inevitably have a low priority among all the cases the Supreme Court has to decide. It would be in the interest of all concerned to find a way to relieve the Court from having to decide these cases, and many other—non-constitutional—cases in the general area of administrative law.

There are some further observations which may be made with respect to the work being done by the Court. Here again, lack of adequate time to do a completely thorough job may be an important factor in the problem. As I have reviewed the decisions of the Court in recent years, there are not many of the results reached, it seems to me, which are really objectionable on what might be called sound professional grounds. But in an unfortunate number of the cases, in my view, the opinions proceed on too broad grounds, and it is these grounds, rather than the actual points decided, which have caused some of the trouble. This is an area where perhaps the Chief Justice can have an especial influence.

Take, for example, the *Watkins* case—*Watkins* v. *United States*, 354 U.S. 178 (1957)—where the Court reversed a conviction for contempt of Congress and talked in rather broad terms about the

powers of Congress in this field. Or the *Sweezy* case—*Sweezy* v. *New Hampshire*, 354 U.S. 234 (1957)—which was decided at the same time. The latter case has been the subject of an intemperate attack by the Attorney General of New Hampshire, though he was losing counsel in the case and might better have been more restrained. The former case has occasioned a good deal of complaint in Congress. Looking as a lawyer at the facts of these cases, and what was decided, I cannot believe that they are truly objectionable. But both opinions contain broad statements, which might better, I think, have been carefully guarded and trimmed away. Most of the reaction comes from the breadth of some of the statements in the opinions, which were not really necessary to the decisions themselves.

Another case to which I would refer is *Hoag* v. *New Jersey*, 356 U.S. 464, decided last May. Here the majority of the Court held that a person could be tried and convicted in New Jersey of robbery after he had been acquitted of robbing three other persons on the same occasion. Note that this was an appeal from a State court, and that New Jersey had held that such a second trial was consistent with its law. The only question was whether this violated the Fourteenth Amendment's prohibition against an action contrary to "due process of law." In this case, the Chief Justice filed a dissenting opinion. He felt that "the conviction of this petitioner has been obtained by use of a procedure inconsistent with the due process requirements of the Fourteenth Amendment." But he never tells us why. To me there is more of yearning than of law in this opinion. Perhaps it is his long experience as Governor which leads the Chief Justice to approach problems in some cases in terms of generalities and without sharp focus.

Finally, there is one important area where I have long found myself in sharp disagreement with a majority of the Court. In the field of interstate commerce, Congress has refused to pass a workmen's compensation act, but has instead left in force the Employers' Liability Act, which bases liability on negligence and fault. Yet, over a series of years, the Court has, by one extreme decision after another, largely transformed this statute into a workmen's compensation act, with unlimited liability. Justices Black and Douglas have been the leaders in this movement. Closely related to this has been the substantial elimination of any effective judicial restraint in civil jury trials, so that state courts are repeatedly required to allow juries to find verdicts on an amount of evidence which can hardly be called a scintilla. I am sorry that the Chief Justice has followed along in these cases. Indeed, these cases ought not to be before the Supreme Court at all. That the Court has brought them there through certiorari only enhances my criticism in this field. Speaking in purely professional terms, without any reflection on motive, this is one area where the Court has, to me, yielded unduly to its "activists," and thus caused itself unfortunate harm.

My hope would be, then, that the Court would endeavor, as a matter of its wisdom and judgement, to exercise great care to decide constitutional questions only when absolutely necessary, and then only in carefully guarded and narrowly written opinions designed to decide only the precise question then before the Court, and inescapably required to be decided. If it be said that this is the Frankfurter line, I would say that it is none the worse for that. Moreover, I am sure that he would be the first to agree that he did not originate this approach, but that he got it from, among others, James Bradley Thayer, a great professor in the Harvard Law School two generations ago, who should be remembered more widely than he is.

The Supreme Court deserves our respect and our understanding. It is inevitably in a vulnerable position. Considering that vulnerability, and the inherent complexity of the issues before it, it can do much to protect itself—and thus its essential function in our remarkable governmental structure—by hewing to the narrow line, by deciding only what it has to decide, and then only in precise terms limited to the particular case. This is not a suggestion that the Court should be timid, or that it should decide any case other than the way it thinks it should be decided. This would be unthinkable. But it does mean that it should never decide anything that it does not have to decide in the constitutional field, and that what it does decide should be put on the narrowest appropriate ground. The Court's function is far too important to be subjected to attack on grounds which bear no necessary relation to the substance of its decisions.

In many ways in recent years, as Professor Paul Kauper has said (Frontiers of Constitutional Liberty (1958) p. 232), "the Court has helped to restore a sense of national self-respect." And as Carl McGowan has recently said ("The Supreme Court in the American Constitutional System—The Problem in Historical Perspective," 33 Notre Dame Lawyer 527, 547 (1959))—

> "It is one thing to be critical of the Court's handling of particular issues, and quite another to carry attack to the point of obscuring the nature of the judicial function in such a manner as to risk its permanent impairment. Justice Holmes once said of criticism of the latter sort that it bespoke 'an unrest that seems to wonder whether law and order way.' "

I believe that law and order pay. I believe that the Supreme Court has been a great instrument towards law and order and justice and an effective and workable constitutional system in these *United* States.

TWO NEW RULES OF THE SUPERIOR COURT

At a meeting of the Justices held at Boston on the twelfth day of September, 1958, the following rule was adopted:

RULE 33A

(Applicable to Actions of Tort or Contract entered after September 1, 1958, where the ad damnum exceeds one thousand dollars.)

REQUIREMENT OF STATEMENT

Within two months after issues are joined, or within such further time as the Court may allow not to exceed six months after issues are joined, the plaintiff shall file with the clerk a statement setting forth the facts in full and itemized detail upon which the plaintiff then relies as constituting the damages.

After such statement is filed, a copy thereof shall be given to the defendant within five days.

Failure to file a statement as herein provided shall be the equivalent of a statement by the plaintiff that the evidence then available to him would not warrant a reasonable likelihood that recovery will exceed one thousand dollars if the plaintiff prevails.

By the Court,
THOMAS DORGAN, *Clerk.*

EDITOR'S NOTE

To avoid misunderstanding in the first paragraph "the facts in full" refer not to the whole case, but to "the damages." F. W. G.

At a meeting of the Justices held at Boston on the twelfth day of September, 1958, it was voted to adopt the following order:

AMENDMENT TO RULE 14

(Applicable to equity cases and cases of divorce and nullity or validity of marriage.)

SUBSTITUTED SERVICE ON NON RESIDENTS

ORDERED: That Rule 14 of this court be and the same is hereby amended, effective forthwith, by striking out the first paragraph and substituting in place thereof the following:

Whenever it appears that a defendant or libellee resides out of the Commonwealth or in parts unknown and no service of process has been made upon him within the Commonwealth, the clerk, on application of the plaintiff or libellant, at any time after the filing of the bill or libel, shall enter an order requiring such defendant or libellee to appear and answer the plaintiff's bill or libel on a certain return day. If the defendant or libellee resides in any part of North America (including the West India Islands, the Bahama Islands and the Bermudas), in Hawaii or in Europe, the return day shall be not later than the fourth return day succeeding the date of the order; if in other parts, or in parts unknown, the return day shall not be later than the fifth return day succeeding the date of the order. The order shall state the title of the suit, and shall set forth briefly the substance of the plaintiff's bill or libel. It shall notify the defendant or libellee to appear and defend substantially in conformity, mutatis mutandis, with the command of the subpoena prescribed by Rule 10. A copy of the order shall be served on such defendant or libellee personally if practicable. Otherwise the order shall be served by publishing a copy three times in different weeks in some newspaper, designated by the clerk or the court, published in the county where the case is pending, and by mailing a copy of the order, postpaid, by registered mail if practicable, to the defendant or libellee at his last known address. Such services shall be completed, if the defendant or libellee is alleged to be in any part of North America (including the West India Islands, the Bahama Islands, and the Bermudas), in Hawaii, or in Europe, not later than one month before the return day specified in the order; if in other parts or parts unknown, not later than two months before the return day specified in the order.

By the Court,
THOMAS DORGAN, *Clerk.*

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